



European University Institute  
Department of Law

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**Substitutive Powers vis-à-vis Regions.  
A Means to Improve Compliance with European Law?  
The Cases of Germany, Italy and Austria.**

Supervisor: Prof. Renaud Dehousse

LL.M. Thesis  
Florence - February 1995

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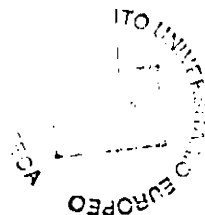
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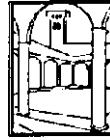


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Robert Pochmarski  
LL.M.Thesis EUI Florence., February 1995  
Substitutive Powers vis-à-vis European Regions.  
Really a Means to Improve Compliance with European Law?  
The Cases of Germany, Italy and Austria

## Abstract

European integration is perceived as an additional factor in the 'creative tension' between state and regions in the last years. This relationship, that per definition can never be static, is undergoing a profound change in the emerging system of multilevel governance in the European Union. Political debate as well as juridical analyses have focused primarily on participation-structures for sub-national territorial units and on the shift of competences. These questions were, in addition, generally envisaged from a merely technical viewpoint. Yet regions do play the role of key actors as far as they are entrusted with the implementation of European law. Lacks in the implementation phase are seen as a serious challenge or a threat to the Community legal system as a whole. Instruments developed on the European level to improve compliance with Community law are well known: the direct applicability, the Francovich-approach and the possibility of the ECJ to impose a penalty payment or a lump sum under Article 171 ECT. Domestic means that aim to improve the implementation performance of sub-national units are far less known. This paper questions the premises of concept and legitimation of substitutive competences; it evaluates their effect in comparison to the other existing instruments. The study seeks to demonstrate that responsibility for non-compliance is shared rather than resting exclusively upon the state. It further argues that substitutive powers as a domestic instrument are determined in first case by the respective context. Case studies on substitutive powers in Germany, Italy and Austria demonstrate how constitutional reality and the dominant patterns of behaviour of the actors determine the outcome. The author concludes that the concept of substitutive powers reveals theoretical lacks in the process of further integration. In addition, the paper tries to contribute to the question of how (multidimensional) federalism works today.





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# Abbreviations

A	Austria
AöR	Archiv des öffentlichen Rechts
Art	Article
BayVBl	Bayrisches Verwaltungsblatt
BGBI	Bundesgesetzblatt [Federal Gazette]
Bd	Band [volume]
BR	Bundesrat [Federal Council A/BRD]
BRD	Bundesrepublik Deutschland
B-VG	Bundesverfassungsgesetz [Federal-Constitutional Law]
BVerfG	Bundesverfassungsgericht [Constitutional Court - BRD]
BVerfGE	Entscheidungen des BVerfG [collected decisions]
CI	Costituzione Italiana
CML Rev	Common Market Law Review
CC	Corte Costituzionale [Constitutional Court - It]
DÖV	Die Öffentliche Verwaltung
DVBl	Deutsches Verwaltungsblatt
d.P.R.	decreto del Presidente della Repubblica [presidential decree -It]
dt	deutsch(es) [german]
EC	European Community
ECHR	European Convention on Human Rights
ECJ	European Court of Justice
ECR	Report of Cases before the ECJ
EEA	European Economic Area
EFTA	European Free Trade Association
EiR	European Law Review
EU	European Union
EuGRZ	Europäische Grundrechte Zeitschrift
EUI	European University Institute
EuR	Europarecht
EWV	EEA
ff	PP
FN	Footnote
FS	Festschrift
Giur Cost	Giurisprudenza Costituzionale
GG	Grundgesetz [Basic Law]
G.U.	Gazzetta Ufficiale [Official Journal - It]
IKL	Integrationskonferenz der Länder
It	Italy
JBl	Juristische Blätter
JRP	Journal für Rechtspolitik
JZ	Juristen Zeitung
LHK	Landeshauptleutekonferenz [Conference of Land governors - A]
LJoEI	Legal Issues of European Integration
MLR	Modern Law Review
n.	numero
NJW	Neue Juristische Wochenschrift
OJ	Official Journal
ö	österreichisch [austrian]
ÖJT	Österreichischer Juristentag
ÖJZ	Österreichische Juristen Zeitung
ÖZP	Österreichische Zeitschrift für Politikwissenschaft
Rndz	Randzahl
TEU	Treaty on European Union
UVS	Unabhängige Verwaltungssenate [independent administrative tribunals - A]
VfGH	Verfassungsgerichtshof [Constitutional Court - A]
VfSlg	Sammlung der Erkenntnisse des VfGH [collected decisions]
VVdStRL	Veröffentlichungen der Vereinigung dt Staatsrechtslehrer
WEP	West European Politics
Z	Ziffer [number]
ZöR	Zeitschrift für öffentliches Recht
ZParl	Zeitschrift für Parlamentsfragen
ZRP	Zeitschrift für Rechtspolitik



# I.Substitutive Powers vis-à-vis European Regions: Concept and Legitimation

*"To balance a large state or society ... whether monarchical or republican, on general laws, is a work of so great difficulty, that no human genius, however comprehensive, is able, by the mere dint of reason and reflection, to effect it. The judgements of many must unite in the work; experience must guide their labor; time must bring it to perfection, and the feeling of inconveniences must correct the mistakes which they inevitably fall into their first trials and experiments."*

[Alexander Hamilton, *The Federalist Papers*, Number Eighty-five quoting David Hume, *Essays and Treatises on Several Subjects*, London, 1768, I, 134]

## 1. Background

The notion that several constitutional<sup>1</sup> and administrative problems are caused by the coincidence of European Integration with nation states, that have - to use a very generic term - a division of authority between different levels of government, might appear cliché. It was only in the 1980s that the 'simultaneity' of the integration process and states with a federal structure, and the problems connected with this, found expression amongst academics as well as among a broader public. In Germany, however, the sensibility towards this problem dates back to the 1960s when *Hans Peter Ipsen* described the Community to be *Landesblind*<sup>2</sup> (blind to the regional level).

One reason was, of course, the increasing 'deepening' of the Community, starting with the White Paper of 1985. The extension of Community powers that were perceived as hard core competences of Länder, such as culture, was perceived as a real threat to the federal system as such. Thus the German *Länder* claimed for 'compensation'<sup>3</sup> for this loss of 'power resources' in the course of the ratification of the Single European Act (signed on February 17 and 28, 1986). One important result was the *participation-procedure* 1986 at the national

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<sup>1</sup>Clearly the tension between federalism and integration might, in a broader context, be envisaged as part of the question of the consistency or inconsistency of national constitutional values with Community law. Compare, e.g.: *De Witte*, *Community Law and National Constitutional Values*, LLoEi 1991/2, 1-22.

<sup>2</sup>*Ipsen*, *Als Bundesstaat in der Gemeinschaft*, in: *Caemmerer/Schlochauer/Steindorf*, FS Hallstein, 248.

<sup>3</sup>The claim for 'compensation' is, however, not a new one. As early as in the mid 1970s the Enquête-Kommission had observed a 'continuous loss of substantial power of the Länder' (kontinuierlicher Substanzverlust). It pointed out that this process could neither be stopped nor reversed, but only 'compensated for'. A further development of cooperative federalism was then proposed. It goes without saying that questions as well as answers must necessarily be similar. There has undoubtedly been a shift of competences to the European level since then (that affected many relevant fields of Länder competences). *Dieter Grimm* argued that the future of a 'balanced federalism' would lie more in European institutions than in the nation states. Nearly two decades later his argumentation might be seen as visionary.- See: *Grimm*, *Die Revision des deutschen Grundgesetzes*, ÖZP 1977, 403f.



decision-making process in European matters<sup>4</sup>. Furthermore, these claims for 'compensation' might be understood as an important part in the tendency towards 're-federalisation' in Germany and in Austria.

When after the *European Annus Mirabilis 1989* the 'deepening-process' accelerated even further, with the Maastricht-Treaty signed on February 7, 1992, the German *Länder* were again successful in making a package-deal. The major result was a further development of the internal participation of the *Länder* at the decision making process in European affairs and its enshrining in Article 23 of the German Basic Law (the so-called *Europe-Article*). Connected with this are, on the external (i.e. the communitarian) level, the Committee of the Regions with advisory status and the possibility of representation of a Member State of the EU in the European Council by a representative of a sub-national unit, which were established by Article 198a and 146 of the Maastricht Treaty. The latter changes cannot be qualified as a 'merit' of only federalist Germany and its *Länder* but equally of Belgium<sup>5</sup>, which since the state reform of 1993 has constituted a real federalist state<sup>6</sup>. The internal participation-model as well as the external participation and representation shall, however, only be dealt with in this paper as far as is absolutely necessary for an overall view of the crucial relations and interactions between the European Union, Member States and sub-national units, and thus for a better understanding of our topic.

A second reason for the intensified appreciation of the problems connected with (further) European Integration and a federalist state-organisation model was, of course, the 'widening' of the Union. The application for membership by the federal state<sup>7</sup> Austria (July 17, 1989) and by one of the most traditional federal states, Switzerland (May 26, 1992<sup>8</sup>), have undoubtedly had an impact on the discussion in course. In addition, a tendency towards 'federalisation' (understood in a broad sense) is also visible among some of the Member States of the Union itself. This process and its results as well as the 'federal status' of the above-mentioned applicants demand closer observation.

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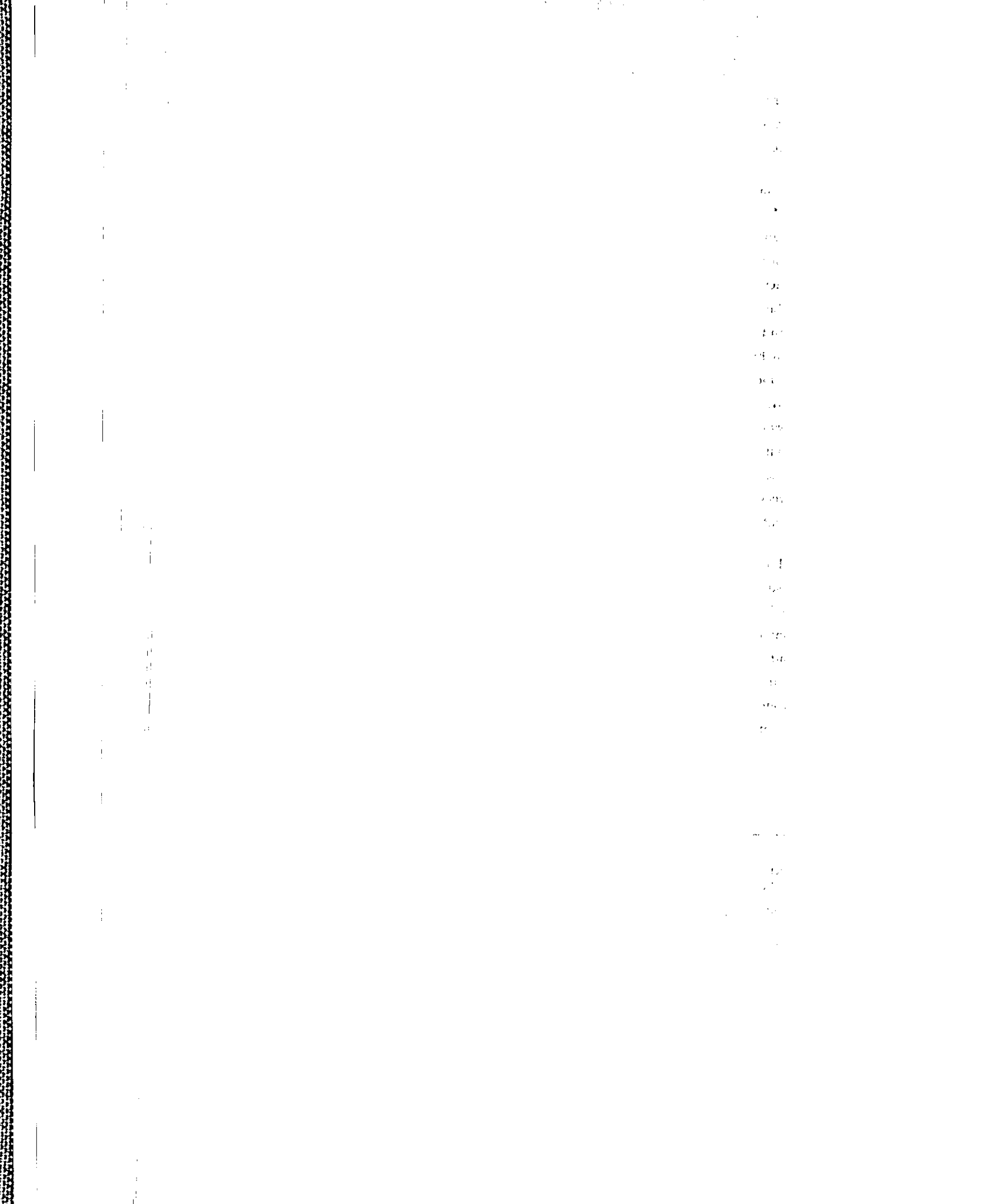
<sup>4</sup> Art 2 dt Gesetz vom 19.12.1986 zur Einheitlichen Europäischen Akte vom 28. Februar 1986, dt BGBl II vom 24.12.1986, 1102.

<sup>5</sup> See: Borchmann, Die Forderungen der deutschen Länder zur Politischen Union, Europa-Archiv 1991, 340-348.

<sup>6</sup> See only: Delpérée ed al (ed.), La constitution fédérale du 5 mai 1993, Bruxelles: Bruylant, 1993; Jean-Luc Dehaene, prime minister of Belgium: "Dotée de cette nouvelle structure fédérale, la Belgique pourra tout mettre en oeuvre, en sa qualité de président de la Communauté européenne pendant le second semestre de l'année, pour rendre le traité de Maastricht opérationnel, premier pas vers un véritable structure fédérale européenne. L'avenir de la Belgique et celui de l'Europe résident, nous sommes convaincu, dans la concrétisation dynamique de l'unité dans la diversité." - Delpérée ed al (ed.), La constitution fédérale du 5 mai 1993, 242; Witte, Belgian Federalism: Towards Complexity and Asymetry, WEP 1992, 95ff; Article 146 EC Treaty goes back to a Belgique and German proposal.

<sup>7</sup> Article 2, Section 1 of the Austrian Federal-Constitutional Law: Austria is a federal state.

<sup>8</sup> The negotiations with Switzerland have only been suspended since the negative result in the referendum regarding the EEA-Treaty of December 6, 1992; the application for membership has not so far been withdrawn.





## 2. 'Sub-national units' in the European Context

At this point it has to be remarked that one has to avoid being *the slave of words* (i.e. regionalism and federalism) in the debate about the *federalising process* in European nation-states. Such labels tend to be misleading, like an examination of Community Law "through the glasses of domestic constitutional law"<sup>9</sup> would be.

This paper avoids traditional categorisations<sup>10</sup> between federalist systems, unitarian states and models of decentralisation and regionalisation in constitutional law. Classical criteria like *originary sovereign powers*<sup>11</sup> or relations based on *parity* (between a federation and the federal states) are more prescriptive than descriptive. They are thus not idoneous criteria for an examination of the implications of European law on 'regions'.

*Länder, Kantone and Regions* might therefore be understood as sub-national-entities with similar interests in safeguarding their, albeit different, power resources<sup>12</sup>. European law seems - from this point of view - to have very similar implications on 'European regions' or sub-national-units with a certain - minimal - level of legislative and administrative competences.

*Renaud Dehousse* has described the approach which resembles the *territorial politics approach* in political science thus:

"Si l'on renonce ainsi aux critères de différenciation proposés dans de nombreuses analyses constitutionnelles (participation des entités fédérées au gouvernement de la fédération, garantie constitutionnelle de leur existence, maîtrise des compétences résiduelles, absence de tutelle, etc.), c'est pour mieux mettre en lumière le fait que fédéralisme et régionalisme - pour autant que l'on puisse opérer une distinction nette entre ces deux concepts - font partie d'un *continuum* qui va de la centralisation de l'état unitaire à des formes très poussées de décentralisation."<sup>13</sup>

Sub-national institutions do matter. Yet they matter not only because of competences attributed to them in constitutions, but also because of the ever growing relations crossing and transcending the national level or, in other words, a multitude of factors that determine their

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<sup>9</sup>*Frowein*, Die rechtliche Bedeutung des Verfassungsprinzips der parlamentarischen Demokratie für den europäischen Integrationsprozeß, EuR 1983, 301f.

<sup>10</sup>Compare, for example: *Balboni/Pastori*, Il governo regionale e locale, in: *Amato/Barbera*, Manuale di diritto pubblico, 575ff.

<sup>11</sup>For the overcoming of the concept of sovereignty in the course of European Integration see for instance: *Christiansen*, European Integration Between Political Science and International Relations Theory: The End of Sovereignty, EUI Working Paper RSC No. 1994/4; The approach proposed here, however, is not to diminish the merits of developing criteria of federal systems. This was particularly important as regards the interpretation of the Austrian Constitution in a 'federal way'. Compare: *Esterbauer*, Kriterien föderativer und konföderativer Systeme - Unter besonderer Berücksichtigung Österreichs und der Europäischen Gemeinschaften, Wien: Braumüller, 1976.

<sup>12</sup>It should not be forgotten that on the regional level we are confronted with different actors with distinguishable interests and not a 'monolithic' body. An analysis of the various interactions between these actors and the relations and networks to actors on the national level lies, though, far behind the scope of this study. For the mediation of the interests of actors of the Austrian Länder see only *Morass*, Regionale Interessen auf dem Weg in die Europäische Union, Wien: Braumüller, 1994.

<sup>13</sup>*Dehousse*, Fédéralisme et relations internationales: Une réflexion comparative, 5f.

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room for *manoeuvre*. What was observed by Fritz Scharpf<sup>14</sup> in the German federal experience of the seventies, namely the interlocking of policies and politics between the different levels of government, is exactly what is likely to happen in the framework of European Integration<sup>15</sup>. This, however, would be with the participation of three levels of government. The needs for coordination have, in fact, transcended the boundaries of national and organisational hierarchies and have led to multilevel policy-making<sup>16</sup>. "Public policy is", as Scharpf argued, "increasingly the result of international and transnational networks of negotiations. By contrast, conventional notions of democratic accountability presuppose a model of the nation state that is characterised by external sovereignty and internal hierarchical authority."<sup>17</sup> However, an examination of the effects that this *doppelte Politikverflechtung*<sup>18</sup> (double interlocking of policies and politics) has on interests and the decision-making process as such<sup>19</sup> is beyond the scope of this paper.

In addition, we have to be aware that it is necessarily inherent in the *federalising process* now in course in several European states that it will not stop at a certain stage. This is not to assert that a federalist system must by automatism steer towards more and more federalism, but only to say that federalist structures can by definition never be motionless. Even the long period of "hyperstability" that has characterized Swiss federalism in the last decades is now put in question. This is caused not at least by the broad differences between the french and german speaking regions in the recent referenda about the integration of Switzerland in European and International organizations (EEA, Blue Helmets). In Belgium for instance the end of the federalizing process seems almost impossible to predict<sup>20</sup>. The same is true for Italy, where the government after the elections of March 1994 announced to make a proposal in order to change the structure of the Italian state towards a federal system within six

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<sup>14</sup>Scharpf/Reissert/Schnabel, *Politikverflechtung: Theorie und Empirie des kooperativen Föderalismus in der Bundesrepublik*, Kronenberg: Scriptor, 1976.

<sup>15</sup>Scharpf also understood the similar decision patterns (joint decision making) in Germany and the European Community as consequences of similar institutional conditions. This conditions have - according to him - led to the prevailing of a 'bargaining style' in decision making. - Scharpf, *The Joint-Decision Trap: Lessons from German Federalism and European Integration*, Public Administration 1988, 239.

<sup>16</sup>Scharpf, *Community and Autonomy - Multilevel Policy-Making in the European Union*, EUI Working Paper RSC No. 94/1, Florence 1994, 11, 16.

<sup>17</sup>Scharpf, *Versuch über Demokratie in Verhandlungssystemen*, Max-Planck-Institut für Gesellschaftsforschung Köln Discussion Paper, 92/9, 5.

<sup>18</sup>This term goes back to Rudolf Hrbek. - Hrbek, *Doppelte Politikverflechtung: Deutscher Föderalismus und Europäische Integration - Die deutschen Länder im EG-Entscheidungsprozeß*, in: Hrbek/Thaysen, *Die deutschen Länder und die Europäischen Gemeinschaften*, 17ff; The interlocking of politics and policy as characteristic for consensual democracies was first perceived by Lehmbruch in the cases of Austria and Switzerland. - Lehmbruch, *Proporzdemokratie. Politisches System und politische Kultur in der Schweiz und Österreich*, Recht und Staat 335/336, Tübingen: J.C.B. Mohr, 1967.

<sup>19</sup>For modalities of non-market coordination through positive and negative coordination in negotiation-systems, compare: Scharpf, *Positive und negative Koordination in Verhandlungssystemen*, Max-Planck-Institut für Gesellschaftsforschung Köln - Discussion Paper 93/1.

<sup>20</sup>Even proposals according to which Flandres, Wallonia and Brussel could as post-national entities belong directly to the Community and Brussels itself would be comparable to the 'District of Columbia' are not absolutely unthinkable. - Drèze, *Regions of Europe: a feasible status*, to be discussed, *Economic Policy*, October 1993/17, 265-307.



months<sup>21</sup>. The failure of this announcement was one of the reasons for the breakdown of the three-party-coalition in December 1994. It remains to be seen how the Italian Regions, characterised by *Salvemini* "[un] vaso vuoto targato Regione"<sup>22</sup>, can develop. Even Austrian federalism has not reached a 'final point', given the long debated "federal-state reform"<sup>23</sup> and the open question of fiscal federalism.

Spain, which can be called *a state of autonomous entities* (Article 2 and 137ff Spanish Constitution), is characterised by broad competences of the *Comunidades Autónomas*, the statute of which can only be amended by consent of the Cortes Generales and the Autonomous Community Assembly according to Article 147, Section 3 Spanish Constitution (thus guaranteeing the status quo of gained autonomy). In this case *the thin line between regionalism and federalism*<sup>24</sup> becomes particularly visible and at the same time the usefulness of such labels becomes questionable.

In this framework the Commission's intention not to introduce a Community definition of what constitutes a Region, because the historical development of the organisational and political structures in the Member States is very different and because this is a matter which falls within the exclusive competence of the member states<sup>25</sup>, seems to be very reasonable.

For the purpose of this paper, however, the sub-national units should not only be qualified as territorial entities which are immediately subordinated to the nation-state and have elected (and not only appointed) representatives<sup>26</sup>, but should have almost a certain power in legislation and administration. 'European regions' fulfilling such a minimal criteria in legislation and administration have to face, in brief, the following problems<sup>27</sup> in the framework of ongoing European Integration:

\*loss of (material) legislative power in the field of their own competences because not only former competences of the state but also powers of the regions shift to the European level<sup>28</sup>

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<sup>21</sup> Compare the reports of Lieven De Winter (The Impact of Regionalist Actors on the Belgium Political System) and Bruno Dente (Italy: The Thin Line Between Federalism and Regionalism) at the European Forum Conference: Regionalization in Europe: Evaluation and Perspectives - EUI Florence June 2-3, 1994

<sup>22</sup> Paladin, *Diritto regionale*, 11

<sup>23</sup> The "federal-state reform" that in the last four years had been at the centre of the debate between Bund and Länder was unexpectedly cancelled from the agenda in December 1994. However, it is for shure that the reform-projects will return on the agenda. Compare: Pochmarski, *Noch einige Anmerkungen zur Bundesstaatsreform*, *Journal für Rechtspolitik* 1995/1 (forthcoming) and Chapter II.3.

<sup>24</sup> Dente, European Forum Conference, see FN 21.

<sup>25</sup> Commission's answer to Written Question No.858/92 by Mr. Robles Piquer, OJ 1992, C 274/48

<sup>26</sup> These are the criteria of article 3 of the statute of the Assembly of Regions in Europe.

<sup>27</sup> For the dangers and chances for federalism in Germany, Austria and Switzerland in the European Union see only the debates on the conference of German professors of constitutional law in Mainz, October 6-9, 1993. - VVDStRL 53: *Hilf/Stein/Schweitzer/Schindler*, *Europäische Union: Gefahr oder Chance für den Föderalismus in Deutschland, Österreich und der Schweiz*, Berlin/New York: de Gruyter, 1994.

<sup>28</sup> Schröder spoke of 'federal erosions that are taking place in the process of European Integration'. - Schröder, *Bundesstaatliche Erosionen im Prozeß der Europäischen Integration*, *JöR* 1986, 83ff.



\*if the sub-national-entities also participate in the legislation of the federation (e.g. via a second chamber), this traditional participation-model becomes - more or less - useless<sup>29</sup>

In addition, we can also witness a loss of power of the legislative branch within the region in favour the executive branch<sup>30</sup>.

The obvious implications of European Integration, which were in general seen as an erosion or even loss of existing power resources (the so-called '*integration losses*' on the regional level), have led German and Austrian *Länder* to demand 'compensation'. This compensation occurred mainly in two areas.

First, in the form of *participation-models* at the internal decision-making process and in participation at the communitarian level via the Committee of the Regions and the establishment of direct contacts to the Commission (lobbying offices in Brussels). Second, in a - albeit very modest - *new division of competences* between the different levels of state authority.

In Austria European integration was also seen as a chance<sup>31</sup> for the *Länder* to improve their traditionally weak position in the field of legislative competences (especially weaker when compared to the German *Länder* remain at the top in every 'ranking' of federal states in Europe<sup>32</sup>). Even though the Austrian Federal-Constitutional Law of 1920<sup>33</sup> (officially quoted as: ...in the version of 1929<sup>34</sup>) has attributed powers in legislation and administration to the

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<sup>29</sup>As legislative competences of the state (the Bund) shift to the European level *Länder* face a real influence-loss that cannot be compensated by participation models. They are limited to the sphere of (former) *Länder* competences as such.

<sup>30</sup>In the new participation-models as regards European affairs both in Germany and in Austria it is the executive branch of the Land (via the German Bundesrat or the Austrian Integration Conference) which represents the Land and looks after its interests. Inner-Land participation (e.g. the binding of the executive to statements of the land parliament) must necessarily remain insufficient not least because of the temporal constraints and the need to associate with a majority of other *Länder*. For further details, see II.1. and II.3.; For a particular critique at this shift to the executive branch see: *Graf Vitzthum*, *Der Föderalismus in der europäischen und internationalen Einbindung der Staaten*, AöR 115, 1990, 286; Yet the tendency towards a strengthening of the executive is a general phenomenon. Compare, e.g.: *Fiedler*, *The Strengthening of the Executive in the Contemporary Constitutional System*, in: *Starck*(ed.), *Rights, Institutions and Impact of International Law according to the German Basic Law*, 95-114.

<sup>31</sup>This could thus be labelled as the *fifth demand-program* of the Austrian *Länder*. It found its expression in the *political pactum* of October 8, 1992 signed in Perchtoldsdorf between the Federal Chancellor, *Vranitzky*, and the President of the Conference of Land Governors, *Ludwig*. [See Appendix III] The other four demand-programs of the *Länder* (1964, 1970, 1976, 1985) led to several amendments of the Austrian Federal-Constitutional Law: BGBl 1974/444; BGBl 1983/175; BGBl 1984/490; BGBl 1988/685.

<sup>32</sup>To give only one - very significant - example: While 'culture' is seen as hard-core competence of the German *Länder*, it is according to article 10, section 1, number 13 of the Austrian Federal-Constitutional Law competence of the Bund in legislation and administration. For the tension between the competence of the German *Länder* and the European Community (Article 128 EC Treaty) in the field of culture, see: *Bohr/Albert*, *Die Europäische Union - das Ende der eigenständigen Kulturpolitik der deutschen Bundesländer?*, ZRP 1993, 61.

<sup>33</sup>For the controversy about the genesis of Austrian federalism (decentralisation of an unitarian state or originary statehood of the *Länder*) see: *Pernthaler*, *Die Staatsgründungsakte der österreichischen Bundesländer - Eine staatsrechtliche Untersuchung über die Entstehung des Bundesstaates*, Wien: Braumüller, 1979.

<sup>34</sup>This is due to a constitutional amendment (BGBl 1929/392) whose political effect was overestimated. - *Walter/Mayer*, *Grundriß*, Rndz 63. In fact, the major change, namely the election of the Federal President by the people, did not fundamentally change the parliamentary character of the Austrian constitution and the constitutional reality (*Verfassungswirklichkeit*). Given that on June 12, 1994 66.6% of the Austrians voted in favour of joining the European Union, that it was the first time that such a referendum - which is according

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$\chi^2 = 0.97$ ,  $p = .62$

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*Länder* in the form of a general clause (Article 15, Section 1 B-VG<sup>35</sup>), it has reserved all important materia in legislation for the *Bund* in the so-called competence articles<sup>36</sup>. The judiciary is also monopolised<sup>37</sup> by the *Bund*. Until the 1970s there was a strong tendency towards centralisation, with several powers attributed to the *Bund* outside the competence articles of the constitution (especially in the field of economic regulation). This tendency was only reversed in the last two decades when the demand-programs<sup>38</sup> of the *Länder* were partially fulfilled<sup>39</sup>. In financial matters, however, the *Bund* has kept its 'competence-competence' according to the Finance-Constitutional Law<sup>40</sup>. As regards Austria we can now witness a simultaneous *upward movement* of powers to the European Union and the attempt towards a (albeit very modest) *downward movement* of powers to the *Länder* from the *Bund*. The latter, however, is to remain in a central position given that the *Bund* is the main actor in the decision-making process at the European level<sup>41</sup> and has the position of a 'gatekeeper'<sup>42</sup> as regards matters of European Integration. It has rightly been argued that we are not facing a kind of zero-sum confrontation<sup>43</sup> between regional and national level but a development towards a decision-making system that integrates the actors of all three levels.

In an article in 1927 which dealt with the *Anschluß* of Austria to Germany Hans Kelsen argued "that a federal state within another federal state will result in serious complications from the technical-organisational point of view". Apart from the conclusion that a *three-storey federal state* (*dreistöckiger Bundesstaat*) implies many legal problems, given the doubling of "the most difficult form of a constitution, namely the federal one"<sup>44</sup>, his article tried to reconcile

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to Article 44, Section 3 B-VG obligatory for a total-change of the Federal-Constitutional Law (Gesamtänderung der Bundesverfassung) - was held and that thus the change of the basic principles of the constitution (Baugesetze) can take place, it would be, in my opinion, conceivable to speak of the *Austrian Federal-Constitutional law of 1920 in the version of 1994*. Another argument in favour of this is that the joining of the Union not only concerns the identity of the constitution as regards content but, in addition, establishes the validity of a second constitution and thus of a second legal order in Austria. - *Funk*, Die bevorstehende Öffnung Österreichs in den Europäischen Wirtschaftsraum und die Europäischen Gemeinschaften - Referat am 12.ÖJT, 8f; According to the 1994 amendment of the constitution (BGBl 1994/1013) the official title shall now be only: Bundes-Verfassungsgesetz. - see Appendix III.

<sup>35</sup>For Germany compare Article 70 GG.

<sup>36</sup>Articles 10 to 15 B-VG. The competence articles entered into force on October 1, 1925.

<sup>37</sup>Article 82 B-VG.

<sup>38</sup>See FN 31.

<sup>39</sup>For the actual demands for 're-federalisation' and the 'federal state reform', see II. 3.

<sup>40</sup>BGBl 1948/45, Article 3, Section 1.

<sup>41</sup>Also in the case that a representative of the *Länder* is sent to the Council (Article 146 Maastricht Treaty) he will have to look after the interest of the whole state, and thus the *Bund*. Compare II.1.

<sup>42</sup>*Morass*, Regionale Interessen auf dem Weg in die Europäische Union, 14; Similar: *De Witte*, Community law and National Constitutional Values, LJoEI 1991/2, 13; It seems thus more apt to speak of a 'Europe with the regions' than of a "Europe of the regions" - *Leonardi*, Auswärtige Beziehungen und Europäische Angelegenheiten im Bund-Länder Verhältnis, in: *Evers*(Hrsg.), Chancen des Föderalismus in Deutschland und Europa, 157.

<sup>43</sup>*Morass*, Regionale Interessen auf dem Weg in die Europäische Union, 37; *Christiansen*, Territorial Politics and Multilevel Governance in the European Union: The Case of Wales, Paper for the 26th Annual Congress of the German Political Science Association, Potsdam, 25-27 August 1994.

<sup>44</sup>*Kelsen*, Die staatsrechtliche Durchführung des Anschlusses Österreichs an das Deutsche Reich, ZöR 1927, 331.



systems with a different and autonomous genesis and may thereby serve as 'guideline' for this paper.

Although, the *Anschluß* cannot be compared<sup>45</sup> with the project of European Integration from a historical, social, cultural or legal point of view, some technical and structural problems are in a certain way analogous: for instance, the multiplication of legal sources and the problems connected with it. An example is the publication of acts as an expression of the principle of the rule of law. The *telos* of this publication is simply to inform about the content of a law in a clear and exhaustive way.

In decision 3130/1956, which has become rather famous and is often quoted in such a context, the Austrian Constitutional Court (VfGH) stated:

"A rule which requires subtle knowledge in constitutional law, qualified juridical capability and experience and almost the diligence of an archivist to ascertain its sense is no valid norm."<sup>46</sup>

It seems evident that the legal order of the European Union with so many rules, different languages and a complex law-making process must result in some complications, regardless of systems such as CELEX, CD-Rom (Eurocat) and the Council's attempts to create clearer and more simple norms<sup>47</sup>. It would, however, be too simple to blame especially the European level for the problems resulting from complexity of procedures and solutions. Admittedly all legal systems must inevitably be difficult to oversee and to comprehend in a society with such a high need for regulation (*Regelungsbedarf*). Austrian constitutional law is a good example for that complexity and has therefore even been characterised 'to be in a status of progressive fragmentation'<sup>48</sup>. Hence putting the blame on the European Union seems to be unwarranted. However, European law might instead of all attempts to facilitate accessibility - almost at the beginning of (formal) integration, as is actually the case in Austria - lead to some problems due to a lack of expertise, information and maybe acceptance on the part of a bureaucracy that has come from traditional national patterns<sup>49</sup>.

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<sup>45</sup>However, there are authors who argue that there are similar motivations of the Austrian population as regards the two events. - *Pelinka*, Zur österreichischen Identität - Zwischen deutscher Vereinigung und Mitteleuropa, Wien: Ueberreuter 1990, 144. From my point of view, this is a very shortend argumentation which is, in addition, based on an overestimation of continuity in Austria. *Pelinka* here neglects the profound societal changes which have taken place in Austria during the last 50 years.

<sup>46</sup>Verfassungsgerichtshof, Erkenntnis VfSlg 3031/ 1956; Compare also VfSlg 12420/1990.

<sup>47</sup>Council resolution of June 8, 1993 on the quality of drafting of Community legislation, OJ 1993 C 166/1.

<sup>48</sup>*Funk*, Die Entwicklung des Verfassungsrechts in: *Mantl* (Hrsg.), Politik in Österreich, 686.

<sup>49</sup>For the problems caused by non-acceptance of supranational law in the Swiss case see: *Majer*, Rechtsprobleme beim Vollzug von EG- und EWR-Recht im Bundesstaat am Modellfall der Schweiz, EuGRZ 1992, 532.



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### 3. The subject of analysis

#### 3.1. The important role of regions in the 'implementation phase'

This paper is, however, devoted to certain aspects of the federal principle in relation to the implementation of European law, and not to the various implications integration has on the rule of law or on the democratic principle<sup>50</sup>. Returning to the quotation of *Kelsen* it can be said that there are two main problems the Union has to face with regard to European regions:

*\*in the decision making phase*<sup>51</sup>: more (autonomous) actors who want to participate at the decision-making process, making policy-formulation more difficult.

*\*in the implementation phase*: the risk of non-implementation or wrongful implementation by authorities which the Union cannot formally sanction.

This paper is devoted to the latter problem and a comparative analysis of internal models which aim to solve possible implementation shortcomings. It is based on the assumption that the implementation phase is crucial<sup>52</sup> for the success or failure of a programme. Considering that the percentage of directives in the period from 1962 to 1992 for which measures have been notified is about 90%<sup>53</sup>, the importance of the implementation phase must be emphasised. In the words of *Konrad Hesse*: 'To be effective rules must be realised (*verwirklicht*), they must be converted into social conduct'<sup>54</sup>. 'The task of lawyers is therefore not to thwart the effects of legal rules, but to help to put them into operation'<sup>55</sup>. 'Success', according to the Commission, 'depends upon two things. It depends upon political will and on the ability to translate that political will into practical achievement.'<sup>56</sup>

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<sup>50</sup>For the implications of European Integration on the democratic principle and on the rule of law, see: *Holzinger*, Die bevorstehende Öffnung Österreichs in den Europäischen Wirtschaftsraum und die Europäischen Gemeinschaften - Rechtsetzung unter besonderer Bedachtnahme auf den demokratischen und den rechtsstaatlichen Aspekt, Verhandlungen des 12. ÖJT Wien 1994.

<sup>51</sup>According to German legal terminology these phases might also be called rising (*aufsteigend*) and declining (*absteigend*). They, according to the implementation theory, must be distinguished from the policy formulation (before) and the impact (after). - *Siedentopf/Ziller*, Making European Policies Work: The Implementation of Community Legislation in the Member States, 3 quoting *Mayntz* (Hrsg.), Implementation politischer Programme, 238f.

<sup>52</sup>For the importance of implementation, see: *Snyder*, The Effectiveness of European Community Law: Institutions, Processes, Tools and Techniques, MLR 1993, 19.

<sup>53</sup>Denmark notified 96.0%, Greece notified 88.3%. - Commission, Tenth annual report 1992, 7; As regards the 263 White paper measures that have so far entered into force (93% of the 282 measures), 222 of which require national transposition measures, approximately 87% (in the field of public procurement only 59%) of the total number of necessary transposition measures have been taken. Denmark has taken 93%, Ireland 81.4%. - Commission, The Community Internal Market 1993 Report, COM (94) 55 final, c.

<sup>54</sup>*Hesse*, Grundzüge des Verfassungsrechts der Bundesrepublik Deutschland<sup>11</sup>, Karlsruhe 1978, 17ff; Compare also *Francis Snyder*: '(...) law matters: it has its effect on political, economic and social life outside the law - that is, apart from simply the elaboration of legal doctrine.' - *Snyder*, New Directions in European Community Law, London: 1990, 3.

<sup>55</sup>*Pescatore*, The Doctrine of 'Direct Effect': An Infant Disease of Community Law, ELR 1983, 155.

<sup>56</sup>Commission, Second report to the Council and the European Parliament on the implementation of the Commission's White Paper on completing the internal market, COM (87) 203 final, 24.

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However, a certain interdependence between the decision-making phase and the implementation phase cannot be ignored. It has been noted that *Länder* would be more prepared to accept and implement European norms if they were engaged in one way or another in their formulation<sup>57</sup>. As interest groups<sup>58</sup> on the Union level are consulted to avoid problems in implementing a political programme and to assure the effectiveness of European law, so, for the same reason, has the Committee of the Regions been created as a, albeit consultative, participation-model. This presupposes also the covering of a lack of information on the part of the sub-national administrations which is considered as one of the main causes, apart from administrative inertia, for implementation problems<sup>59</sup>. However, a word of caution is necessary here. My argumentation should not be seen as an overall explanation for the conduct of territorial-units in the policy-implementing process nor should it suggest that the actual participation-model would be sufficient for advanced European regions (like the German *Länder*) or even 'the optimum'. First, this institutionalised participation is to be considered only as one among several external and internal factors and processes that might determine 'the willingness' to implement European law. Second, the advisory status of the Committee under Article 198a ECT (which has been harshly criticised<sup>60</sup>) has to be born in mind.

Some illuminating studies have been devoted to the rising phase as far as the relation *Länder* - Community is concerned<sup>61</sup>. Studies have also been made about the implementation of Community legislation in the Member States from a European viewpoint<sup>62</sup>. This paper deviates from the first approach in that it concerns the declining phase and from the second approach in that it tries to reconcile the demands of 'federal systems' with the necessities of European Integration.

An institutional analysis of administrative systems will necessarily be the 'centre of gravity'. I shall but argue that a merely legal analysis is insufficient to comprehend the relevance of substitutive competences in practice. I thus propose to consider the politico-administrative culture and the dominant patterns of behaviour of the states in question. This

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<sup>57</sup>Malanczuk, European affairs and the *Länder*, CML Rev 1985, 271; In this sense also: Blumenwitz, Europäische Gemeinschaft und Rechte der Länder in: Bieber/Bleckmann/Capotorti u.a. (Hrsg.), Das Europa der zweiten Generation - Gedächtnisschrift für Christoph Sasse I, 217; For Spain: González, Die Rolle der Comunidades Autónomas im spanischen Staat und ihre rechtlichen Einflußmöglichkeiten auf die nationale Gemeinschaftspolitik, in: Bayerischer Landtag, Die BRD und das Königreich Spanien 1992, 62.

<sup>58</sup>For the about 1500 interest groups acting in Brussels, compare: Fallik(Ed.), European public affairs directory, Brussels: Landmarks, 1994.

<sup>59</sup>Dehousse, 1992 and Beyond: The Institutional Dimension of the Internal Market Programme, LJoEI 1989/1, 131.

<sup>60</sup>See, for example: Tomuschat, Bundes- und Integrationsgewalt des Grundgesetzes in: Magiera/Merten, Bundesländer und Europäische Gemeinschaft, 43; Kalbfleisch-Kottsieper, Fortentwicklung des Föderalismus in Europa, DÖV 1993, 549; Graf Vitzthum using the word 'pallative' - Graf Vitzthum, Der Föderalismus in der europäischen und internationalen Einbindung der Staaten, AöR 1990, 294.

<sup>61</sup>Birke, Die deutschen Bundesländer in den Europäischen Gemeinschaften, Berlin: 1973; Morass, Regionale Interessen auf dem Weg in die Europäische Union, Wien: Braumüller, 1994.

<sup>62</sup>Siedentopf/Ziller, Making European Policies Work - The Implementation of Community Legislation in the Member States, London: 1988; Compare also: Dehousse, 1992 and Beyond, LJoEI 1989/1, 130 with further references.





will be mainly done in Part II that aims to analyse substitutive powers in their respective context. As for Germany and Austria<sup>63</sup> this paper will also integrate some empirical information in order to complete this theoretical study. This may be seen as a very modest contribution to a better understanding of problems which could arise at the implementation stage due to an internal division of competences.

Without anticipating the results of this analysis I wish to say here that one cannot suggest that *Länder* are in general 'Euro-sceptical'. It should be remembered that the Austrian *Länder* demanded for Austria's application for membership of the Community on November 13, 1987<sup>64</sup>, i.e. before the parties of the Great Coalition and the other national interest groups decided in favour of an application<sup>65</sup>. The attitude of sub-national entities towards European Integration is determined by a vast variety of factors. To discover and evaluate some of them and their implications on the *implementation phase* of European law is one of the tasks of this paper. Yet the diagnosis that *Kenneth Hanf* made in the 1970s for Western nation states has extended to the European level:

Territorial and functional differentiation has produced decision systems in which the problem solving capacity of governments is disaggregated into a collection of sub-systems with limited tasks, competences and resources, where the relatively independent participants possess different bits of information, represent different interests, and pursue separate, potentially conflicting courses of action. At the same time, however, governments are more and more confronted with tasks where both the problems and their solution tend to cut across the boundaries of separate authorities and functional jurisdictions.<sup>66</sup>

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<sup>63</sup>It is intriguing to note that only one of the letters that were sent to all Italian regions (and the autonomous provinces) was answered. The author wants to thank Dott. *Alberto Brasca* and Dott. *Pietro Tanzini* from the Regione Toscana for their exhaustive letter.

<sup>64</sup>*Landeshauptmännerkonferenz* (Conference of the Land Governors) 13.11.1987; Compare also the reaffirmation and the demand for participation at the *Landeshauptmännerkonferenz* (LHK) 25.11.1988 - Bundesministerium für Auswärtige Angelegenheiten, Außenpolitischer Bericht - Jahrbuch der Österreichischen Außenpolitik 1989, 186; For the prominent role of the Land governors and the eminent political de facto importance of the LHK see II.3.3.

<sup>65</sup>The Austrian government only applied for membership on July 17, 1989 in the so-called "Letter to Bruxelles" by now famous in Austria. Compare also the Declaration of the Austrian *Länder* of June 21, 1993. This has so far been the only act taken by the Integration Conference of the *Länder* (which was constituted on the same day). Important declarations in the course of the negotiations with the EU were made directly by the Land governors, without using this apparatus, that may be considered to be too sluggish (almost for the negotiations about the admission). For the Land governors prominent role see Chapter II.3.3.; It is, in addition, intriguing in this context that the Austrian application was made before the events that led to the breakdown of the Berlin wall and of the GDR in November 1989.

<sup>66</sup>*Hanf/Scharpf*, Interorganizational Policy Making, Limits to Coordination and Central Control, 1.



### 3.2. The implementation of European law

Before entering into detail I propose taking a closer look at some federal aspects<sup>67</sup> in the administrative system of the European Union. Given the limited space and the inevitably modest approach of this research in front of such a vast area as administration law in the Member States of the European Union<sup>68</sup>, the reader should be aware that the following remarks simply serve as necessary preconditions of our main topic.

With the exemption of some areas<sup>69</sup> it is up to the Member States to implement European legislation. It is therefore their respective constitutional and administrative law that determines the competent institutions, organs and the procedures to be applied. This *indirect execution*<sup>70</sup> recalls German and Austrian *executive federalism*, where it is the *Länder* that - in general - have the duty to implement out the federal laws (Art 83 dt GG<sup>71</sup>; Art 102 ö B-VG and Art 15[1] ö B-VG)<sup>72</sup>. In both models the exercise of governing functions is shared between the federal government and the *Länder* governments (which therefore is distinguished from the model of American federalism, where formal independence plays a far more important role)<sup>73</sup>. Both systems give the executing authorities a crucial and powerful position:

"[...], l'opinion des représentants régionaux pèse souvent de façon décisive sur la décision finale. Dans un système d'administration décentralisée comme la Communauté européenne, le rôle des techniciens est souvent essentiel: lorsque le concours des administrations régionales est nécessaire, leur influence peut être considérable. De même, lorsqu'une intervention des régions est requise pour la mise en oeuvre des décisions communautaires, leurs représentants disposent *de facto* d'un pouvoir important, parfois équivalent à un véritable pouvoir de veto."<sup>74</sup>

The competent national authorities according to their respective constitutions (and thereby also the sub-national units) thus have duties in two fields:

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<sup>67</sup>This parallelism in administration, however, leads to more questions rather than to a solution to the question about the legal character of the Union. - *Everling*, *Elemente eines europäischen Verwaltungsrechts*, DVBl 1983, 650.

<sup>68</sup>See the exhaustive study of *Schwarze*, *Europäisches Verwaltungsrecht - Entstehung und Entwicklung im Rahmen der Europäischen Gemeinschaft*, 2 Bde. Baden-Baden: 1988.

<sup>69</sup>In particular in competition law (Art. 87 II, 89, 90 III, 93 EC-Treaty).

<sup>70</sup>For this terminology, see: *Everling*, *Elemente eines europäischen Verwaltungsrechts*, DVBl 1983, 650; *Schweitzer*, *Die Verwaltung der Europäischen Gemeinschaften*, *Die Verwaltung* 1984, 139ff; *Beutler/Bieber/Pipkorn/Streil*, *Die Europäische Gemeinschaft*, 200f; *Schwarze*, *Europäisches Verwaltungsrecht*, 24; *Nicolaysen*, *Europarecht I*, 74; *Schweitzer/Hummer*, *Europarecht*, 96f.

<sup>71</sup>Compare also the Articles 30, 91b, 108, 115f, 115i, 120a GG. For the federal character of the German administration, see: *Badura*, *Staatsrecht*, München: 1986, 411ff.

<sup>72</sup>See Article 34 (Executive Function - Implementation of Legislation) of the Draft Constitution of the European Parliament (A3-0064/94; 10.2.1994): The Member States shall implement the laws of the Union.; Compare also the opinion of Advocate General *Roemer* in Case 40/69: In fact these organizations are run on the basis that the necessary central decisions are made by the Community institutions whilst the administrative implementation is the responsibility of Member States. - ECJ Case 40/69 (*Hauptzollamt Hamburg v Bollmann*), ECR 1970, 87.

<sup>73</sup>*Scharpf*, *The Joint-Decision Trap: Lessons from German Federalism and European Integration*, *Public Administration* 1988, 242f.

<sup>74</sup>*Dehousse*, *Autonomie régionale et intégration européenne: les leçons de l'expérience communautaire*, in: *Jacot-Guillarmont* (éd.), *Accord EEE - Commentaires et réflexions*, 703.

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\*to transpose (*ausführen*) European legislation that needs to be put into concrete forms *via legislation*<sup>75</sup>

\*to implement (*vollziehen*)<sup>76</sup> directly applicable European legislation *via administrative measures in an individual case*<sup>77</sup>

The transposing of European law *via legislation* shows, again, that today the (horizontal) *organisational* separation of powers does not coincide with a *material* separation of functions. Thereby the transposing of Community directives by the executive branch might appear as *quasi-legislative* just as the same done by the legislative branch might appear as *quasi-administrative*<sup>78</sup>. In any case, given the detailed character that European law often assumes, the states' room for manoeuvre and thus their power to legislate (*materielle Legislativkompetenz*) often tend to be notably reduced.

However while, it remains true that - in general - regulations fall into the first of the above categories and directives into the second, it should be noted that these recognised classifications tend to break down: a directive might (under certain conditions) be directly applicable<sup>79</sup> and a regulation might need to be completed by certain supplementary or additional measures<sup>80</sup>.

In the absence of a single unitarian administrative law<sup>81</sup> and of a unified European bureaucracy, the transposing via legislation and the implementation via administration of European law are to be effected according to domestic law. This also implies that it is up to the

<sup>75</sup>The term legislation is to be understood in a material sense. This means that regulations by the executive branch may also fall into this category. What matters is that the provisions of national law (into which Directives are to be transposed) have mandatory force. Compare: ECJ, Case 361/88 "Technical Circular Air" (Commission v FRG), ECR 1976, 2567.

<sup>76</sup>For this terminology: *Ipsen*, *Europäisches Gemeinschaftsrecht*, 218f.

<sup>77</sup>The individual-case criteria is decisive for the distinguishing of the term implementation (*Vollziehung* bzw. *Anwendung*) from transposing (*Ausführung*). Compare: *Zuleeg*, *Das Recht der Europäischen Gemeinschaften im innerstaatlichen Bereich*, 47. Categorizations, however, tend to break down in the framework of European Integration.- See the following footnotes.

<sup>78</sup>*Justice Jackson*: "(...)Administrative agencies have been called quasi-legislative, quasi-executive or quasi-judicial, as the occasion required, in order to validate their functions within the separation-of-powers scheme of the Constitution. The mere retreat to the qualifying 'quasi' is implicit with confession that all recognized classifications have broken down, and 'quasi' is a smooth cover which we draw over our confusion as we might use a counterpane to conceal a disordered bed." - *Federal Trade Commission v Rubercoid Co.*, 343 US 470, 487/488 (1952) *K.C.Davies*, *Administrative Law, Cases-Text-Problems*, Minnesota 1978, 28ff.

<sup>79</sup>ECJ Case 41/74 (*Van Duyn v Home Office*), ECR 1974, 1137.

<sup>80</sup>For the limits of such a completion of non self-executing Regulations, see: ECJ Case 40/69 (*Hauptzollamt Hamburg-Oberelbe v Bollmann*), ECR 1970, 69; ECJ Case 39/70 (*Fleischkontor v Hauptzollamt Hamburg*), ECR 1971, 49, especially the opinion of Advocate General *Dutheillet De Lamotte*: It follows from a combination of the two principles [first, that Community law must be equally enforceable in all Member states and second, the obligations of Member States under Article 5 EC-Treaty] that Member States may adopt any necessary implementing measures to the extend to which such measures are indispensable, that their object or effect is not to modify the scope nor add to the provisions of the Community measure in question and finally that they respect all Community legislative provisions.; ECJ Case 32/72 (*Wasa v Einfuhrstelle Getreide*), ECR 1972, 1181.

<sup>81</sup>The European Court of Justice, however, tries to safeguard a minimum standard. - *Nicolaysen*, *Europarecht I*, 75f.



legal system of the individual Member State to determine the competent organs for the implementation of European law. The ECJ has expressed this attitude as follows:

"Each Member State is free to delegate powers to its domestic authorities as it considers fit and to implement directives by means of measures adopted by regional or local authorities. That division of powers does not however release it from the obligation to ensure that the provisions of the directive are properly implemented in national law."<sup>82</sup>

A similar judgement was taken by the Court on December 11, 1973:

(...)it is for the internal legal system of every Member State to determine the legal procedure leading to this result.<sup>83</sup>

In other decisions the ECJ<sup>84</sup> has emphasised the responsibility of the Member States for the implementation of Community law:

A Member State cannot rely upon domestic difficulties or provisions of its national legal system, even its constitutional system, for the purpose of justifying a failure to comply with obligations and periods resulting from Community directives.<sup>85</sup>

Under Article 169 of the Treaty, the Member States are liable no matter which organ of the State is responsible for the failure. A Member State may not plead provisions, practices or circumstances existing in its internal legal system in order to justify a failure to comply with obligations and time-limits under Community directives.<sup>86</sup>

The latter phrase has been frequently used in similar cases and constitutes permanent jurisdiction<sup>87</sup> of the Court. According to 'the well-established case-law'<sup>88</sup> of the European Court of Justice "the liability of a Member State is incurred under Article 169, irrespective of the organ of the State whose action or inaction is responsible for the failure"<sup>89</sup>. In Case 33/90 the ECJ stated:

It alone is re-ponsible towards the Community under Article 169 for compliance with obligations arising under Community law, irrespective of the use which it has made of the freedom to allocate areas of internal legal competence. That is why, in the case where a directive imposes an obligation on Member States to designate the authorities responsible for its implementation and places specific obligations on those authorities, (...), the fact that a Member State after designating such authorities, refrains from taking the measures

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<sup>82</sup>ECJ Case 227 to 230/85 "Waste" (Commission v Belgium), ECR 1988 I, 1.

<sup>83</sup>ECJ Case 141/73 "Investment aid" (Lohrey v FRG and Land Hessen), ECR 1973, 1527.

<sup>84</sup>Besides, in both the following cases the Italian Republic as defendant tried to explain its failure to adopt within the prescribed period the measures provided for by directives of the EEC by means of the instability of the Italian political system (early dissolution of the chambers, governmental crises), adding in the second case that the delay in implementing the directives would be easily explicable in the light of the complex nature of the matter.

<sup>85</sup>ECJ, Case 100/77 "Metrology" (Commission v Italian Republic), ECR 1978, 879.

<sup>86</sup>ECJ, Case 52/75 "Vegetable Seed" (Commission v Italian Republic), ECR 1976 I, 277.

<sup>87</sup>ECJ Case 74/89 "State Aid" (Commission v Belgium), ECR 1990, 491: 'As the Court consistently held a Member State may not plead provisions, practices or circumstances existing in its internal legal system in order to justify a failure to comply with its obligations under Community law.'; Out of the large number of cases see the recent: ECJ Judgement of May 18, 1994 Case 303/93 "Electrically Operated Lifts" (Commission v Italy) and Opinion of Advocate General Jacobs delivered on April 13, 1994, 2. However, it should be noted that the principle that a state may not plead internal provisions for the purpose of legitimising a failure to fulfil international obligations is an established fundamental axiom in public international law.

<sup>88</sup>ECJ Case 167/90 "Pharmacy Diplomas" (Commission v Belgium), ECR 1991, 2535.

<sup>89</sup>ECJ Case 52/75 "Vegetable Seed", ECR 1976 I, 281.





necessary to ensure that those authorities meet their obligations constitutes a failure within the meaning of Article 169 of the EEC Treaty.<sup>90</sup>

Recently the ECJ referred even more specifically to the situation of a state with a federal structure:

It is for all the authorities of the Member States, whether it be the central authorities of the State or the authorities of a federated state, or other territorial authorities, to ensure observance of the rules of Community law within the sphere of their competence.<sup>91</sup>

The latter two judgements of the ECJ are particularly intriguing not only because they state that a Member State cannot discharge its obligations towards the Community by relying on the fact that it has delegated to its sub-national entities the power to adopt the implementing legislation but also because the Court verified the efficiency of domestic measures in the framework of a vertical division of competences. In so far as the Court did not limit itself to the usual emphasising of the general duty of (all organs of) the Member States to fulfil their obligations but also evaluated the effectiveness of the Member States' internal legal system and of the measures foreseen by it (for example, the administrative directives of *Länder*<sup>92</sup>) or its structures (delegation of powers to regions), the Court had shown a slightly 'new'<sup>93</sup> attitude: It is no longer entirely blind vis-a-vis the domestic legal system and thus federal systems and their mechanisms. In fact, this change is more semantic than substantive, because it is only the states that are held responsible in proceedings under Article 169 ECT.

This 'new attitude', however, might also have another - negative - side: The Commission argued in Case 33/90 that 'a Member State is not obliged to delegate its powers to regions, provinces or communes, particularly if it may consider that such a delegation is likely to hinder the proper application of a directive'<sup>94</sup>. Here the Commission ignored the fact that a Member State - like Italy - may well be obliged by its legal system to delegate powers to sub-national entities. The position taken by the Commission in Case 33/90 recalls the position of the centralist Italian state at the beginning of the 1970s (also supported by the *Corte Costituzionale*). Interpreted in this way it could well be utilized by centralists in Italy who want to return to the *infant years* of Italian regionalism.

Summarising, *domestic difficulties, provisions of national legal systems, even constitutional systems, practices or circumstances existing in its internal system are by no means a justification*

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<sup>90</sup>ECJ Case 33/90 "Toxic and Dangerous Waste" (Commission v Italian Republic), ECR 1991, 5987f.

<sup>91</sup>ECJ Case 8/88 "EAGGF-Disallowance of expenditure" (Federal Republic of Germany v Commission), ECR 1990, 2321.

<sup>92</sup>See also II.1.1.

<sup>93</sup>Effectiveness has always been a yardstick of the Court. However, it seems to me that the Court has recently been evaluating mechanisms within federal systems in a more exhaustive way. An example is Case 237/90 in which the ECJ decided that the German Federal Government ought to have imposed a notification duty on the *Länder* in order to fulfill its own obligation vis-à-vis the Community. The Federal Government's statement that such an explicit provision concerning a notification duty of the *Länder* towards the Bund would be unnecessary given that such a duty is the result of the principle of federal comity [*principe de la loyauté envers le Bund*], was considered insufficient by the Court. - ECJ Case 237/90 "Trinkwasserverordnung" (Commission v FRG), ECR 1992, 5973.

<sup>94</sup>ECJ Case 33/90 "Toxic and Dangerous Waste" (Commission v Italian Republic), ECR 1991, 5993.



for non-compliance before the ECJ. To the above listed factors may be added an *unstable political system* (which can be subsumed under domestic difficulties as well as under constitutional system<sup>95</sup>), the *complex nature of the matter, independent administrative authorities* or a *regional or federal order*. Even the argument of *force majeure* and the 'practical difficulties' arising from it cannot be relied on indefinitely:

Although a Member State which has encountered momentarily insurmountable difficulties may plead *force majeure* to justify its failure to comply with its obligations imposed by a Community directive, this applies only to the period needed by an administration showing a normal degree of diligence to overcome those difficulties.<sup>96</sup>

If the European Community accepted 'internal difficulties' (understood in the broad sense defined above) as a valid justification for the failure to implement directives, its effectiveness would really be at stake. It does not require an enormous insight to imagine the arguments that Member States would then be able to use in case of a procedure under Article 169 EC Treaty in order to justify a failure in implementation. The Italian Republic for example, has in the past given justifications such as a terrorist bomb-attack that destroyed statistic material<sup>97</sup>. It would indeed be an easy way out for Member States. Such an attitude could not, however - as the Commission said<sup>98</sup> - be tolerated in the framework of the Community.

Leaving the Member State the choice of the implementing authority as well as of the forms and methods (Article 189, Section 3 EC-Treaty) and relying at the same time on the classical model of state responsibility (for an eventual failure) is intended to render European law effective. It is permissible that "the application (...) of Community rules (...) depends on the combination of a number of provisions adopted at Community, national and regional level"<sup>99</sup>, if only this guarantees the effectiveness of its rules. The preparatory process of European law has the same task:

"Since the governments of the Member States participate in the preparatory work for directives they must be in a position to prepare, within the period prescribed, the draft legislative provisions necessary for their implementation."<sup>100</sup>

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<sup>95</sup> Advocate General *Maryas* said: "In fact, by virtue of a constitutional practice which goes back several years, parliamentary work is interrupted during a Government crisis." - ECJ, Case 52/75, ECR 1976, 290.

<sup>96</sup> ECJ Case 101/84 "Statistical Returns - Terrorist Attack" (Commission v Italian Republic), ECR 1985, 2629.

<sup>97</sup> ECJ Case 101/84 "Statistical Returns - Terrorist Attack" (Commission v Italian Republic), ECR 1985, 2629.

<sup>98</sup> ECJ Case 39/72 "Premiums for slaughtering cows" (Commission v Italian Republic), ECR 1973, 107.

<sup>99</sup> ECJ Case 272/83 "Agricultural producer groups" (Commission v Italian Republic), ECR 1985, 1057.

<sup>100</sup> ECJ Case 148/81 "Public Limited Liability Companies" (Commission v Belgium), ECR 1982, 3555; ECJ Case 361/85 (Commission v Italian Republic), ECR 1987, 479; ECJ Case 364/85 "Bovine Animals" (Commission v Italian Republic), ECR 1987, 487; ECJ Case 386/85 "Fresh Meat" (Commission v Italian Republic), ECR 1987, 1061; Compare the Commission's statement in ECJ Case 39/72 "Premiums for slaughtering cows" (Commission v Italian Republic), ECR 1973, 106f: "Further, it is proper to note that the Italian Republic, just as the other Member States, was intimately involved in formulating and working out the Regulations in question; at this stage it would have been open to the Italian authorities to present all the arguments of a technical and political nature that they considered appropriate, in the general interest of the Community as well as in Italy's own interest."



The same is true for the participation of sub-national units in the preparatory work that was enshrined in the Maastricht Treaty and in provisions on the domestic level. This allows regions and parliaments to take (formally) part in this process not only out of respect for the federal and the democratic principle<sup>101</sup> but also to improve the effectiveness of European integration itself. In addition, the 'legitimation throughout procedure' (Luhmann<sup>102</sup>) also aims at improving the effectiveness of European law. On the other hand it is also the effectiveness of Community law, its achievements and its results, that provide for legitimation. Here we come full circle: effectiveness of Community law and, in our case, the correct and timely implementation of European law by the organs of members' regions is not an end in itself. Its objective is to promote economic and social progress, and to strengthen the protection of human rights. Thus it is also effectiveness that gives legitimation to the project of European Integration<sup>103</sup>.

Given the different structures of Member States and the vast variety of institutions the so-called 'regional-blindness'<sup>104</sup> of the European Community cannot be understood as an expression of a centralist thought, but must be seen as a mere result of these broad differences and the predominant wish to render the European legal order effective.

In its decision 52/75, the Court repeated "that, in accordance with the general obligations imposed on the States by Article 5 of the Treaty, it is for every Member State to adopt on a national level measures which are the consequences of its membership of the Community"<sup>105</sup>. The duty "to take all appropriate measures, whether general or particular, to ensure the fulfilment of the obligations arising out of this Treaty or resulting from actions taken by the institutions of the Community" is not only a result of *loyalty to the Community-principle* of Article 5 EC-Treaty but equally of Article 189 and of particular provisions in the secondary law itself. It thus binds *all competent state organs*<sup>106</sup> of the Member States.

### 3.3. Internal Provisions that oblige state organs 'to contribute' to European Integration

This leads to the question of whether provisions in domestic law which impose a duty on (independent) state authorities to implement European law are superfluous, or even inadmissible. One might argue that a *double loyalty* of state organs to European Integration would be 'better' than a single one and that it could lead to a more effective implementation of European law. On the other hand such a domestic provision may result in a misleading

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<sup>101</sup>These are, for example, basic principles (*Baugesetze*) of the Austrian Federal-Constitutional Law: Article 1 and 2 B-VG.

<sup>102</sup>Luhmann, *Legitimation durch Verfahren*, 3.Auflage, Darmstadt: 1978, 174ff.

<sup>103</sup>Compare: Snyder, *The Effectiveness of European Community Law: Institutions, Processes, Tools and Techniques*, MLR 1993, 19ff.

<sup>104</sup>Ipsen, *Als Bundesstaat in der Gemeinschaft* in: Caemmerer/Schlochauer/Steindorf, FS Hallstein, 257.

<sup>105</sup>ECJ, Case 52/75, Reports of the Cases before the Court 1976 I, 281.

<sup>106</sup>Daig/Schmidt, in: Groeben/Thiesing/Ehlermann, *Kommentar zum EWG-Vertrag* Bd 4, Art 189 Rndz 40; Geiger, *EG-Vertrag*, Art 5 Rndz 14, Art 189 Rndz 10.



interpretation of the basis of the state organs' obligation to implement European law. We have to remember that:

"The law stemming from the Treaty, an independent source of law, could not because of its special and original nature, be overridden by domestic legal provisions, however framed, without being deprived of its character of Community law and without the legal basis of the Community itself being called into question."<sup>107</sup>

Regulations also bind the Member States (understood in a broad sense as above) and have the force of law in their territories without the need for transformation or confirmation by their legislatures:

The direct application of a Community regulation means that its entry into force and its application in favour or against those subject to it are independent of any measure of reception into national law.<sup>108</sup>

A domestic 'parallel-legislation' is prohibited because it would disguise its Community character. "Consequently", so the ECJ, "all methods of implementation are contrary to the Treaty which would have the result of creating an obstacle to the direct effect of Community Regulations and of jeopardising their simultaneous and uniform application in the whole of the Community"<sup>109</sup>

In our case, however, national provisions have, on the contrary, the function of avoiding a jeopardising of the simultaneous and uniform application of European law in the Member States. I therefore think that they are compatible with Community law in as far as they do not conceal the Community nature of the duty to implementation. 'Parallel loyalty-provisions' do not disguise the 'European character' of this duty if they refer explicitly to European Integration or if their position in the Constitution leaves no doubt about this.

Such a referring is good to be seen in Article 16, Section 6 of the Austrian Constitution:

The Länder are obliged to take measures in their independent domain, which become necessary to implement acts *within the framework of European Integration*; (...).

An example for the 'position in the constitution' argument can be found in the Spanish Constitution Article 93 in Chapter III (Concerning International Treaties) of which assumes the character of a *fulfilment-guarantee* on the part of the central authorities:

(...) It is the responsibility of the Cortes Generales or the Government, depending on the cases, to *guarantee compliance with these treaties and the resolutions emanating from the international or supranational organisations* who have been entitled by this cession.

A similar provision is to be found in Article 1 of the Italian *legge La Pergola* (legge n.86/1989):

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<sup>107</sup> ECJ Case 6/64 (Costa v ENEL), ECR 1964, 586.

<sup>108</sup> ECJ Case 50/76 (Amsterdam Bulb v Produktschap), ECR 1977, 137.

<sup>109</sup> ECJ Case 39/72 "Premiums for slaughtering cows" (Commission v Italy), ECR 1973, 101f.





Con i procedimenti e le misure previste dalla presente legge, lo Stato garantisce l'adempimento degli obblighi derivanti dall'appartenenza dell'Italia alle Comunità europee che consistono: (...)

Whereas in the Spanish and Italian cases it is the duty of central institutions to see that European law is implemented and autonomous institutions are thus only indirectly bound by such domestic provisions, in Austria the sub-national units (*the Länder*) are directly obliged to do so. The situation in Germany is slightly different: there the *Länder* are obliged (*vis-à-vis the Bund*) to implement European law through the unwritten constitutional principle of *federal comity*<sup>110</sup>.

In my opinion it is rather doubtful whether and to which degree such provisions in practice facilitate the administrative tasks of the European Union. As said, there is a multitude of factors<sup>111</sup> (among which the legal framework is to be considered only as one, albeit important, factor) that determine the implementation by states, sub-national units or independent administrative agencies, so that additional domestic provisions that oblige state organs 'to contribute' to European Integration must necessarily be of secondary importance. It cannot be said that states with such provisions have showed a better performance as regards the implementation of Community rules than states that do not know such provisions. They might thus be considered as of a merely 'symbolic' value.

However, a second *telos* of these provisions is undoubtedly that of providing a legal basis for a *substitutive competence* vis-à-vis authorities that are autonomous from the central government.

## 4. Substitutive competences

Substitutive competences regarding the implementation of European law exist in several Member States of the European Union. This chapter will deal with the general concept of substitutive powers of central institutions vis-à-vis independent entities (especially regions) in the framework of European Integration.

In this context the following questions arise: first, are such provisions really legitimised by the argumentation that it is only the Member States which are subject to procedures under Article 169 EC-Treaty (given the liability of territorial units according to the *Francovich-judgement*<sup>112</sup>) ; second, whether the *foreign-policy pouvoir* of central institutions is adequate in the process of European Integration, or whether these matters should be considered home affairs; third, are such provisions really necessary as a 'big stick', or are they destined to remain dead law; fourth, if substitutive provisions are an idoneous means to promote

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<sup>110</sup>See, Chapter II.2.

<sup>111</sup>'The preconditions for the effectiveness of Community law are complex.' - Snyder, *The Effectiveness of European Community Law: Institutions, Processes, Tools and Techniques*, ELR 1993, 53.

<sup>112</sup>Regions as legal entities might be made liable according to the rules of public liability for the actions or omissions of their organs. See p 36ff.

1. The first part of the document is a list of the names of the persons who were present at the meeting. The names are listed in alphabetical order.

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compliance with European law, could such provisions exist in favour of the *Länder* vis-à-vis the *Bund* on a parity basis; fifth, is the idea of devolution<sup>113</sup> limited to the relation state-regions or is it also applicable vis-à-vis independent administrative agencies or other independent units (such as courts).

Having discussed this, I will examine three solutions in their institutional and politico-administrative framework: the German, the Italian and the Austrian. I shall argue that 'framework' has to be understood in a broad sense, transcending the limits of a merely technical approach and considering that the relationship between the different territorial actors must be perceived as multidimensional<sup>114</sup>.

There are several reasons for having selected these, and not for instance the (temporary) substitution foreseen in Article 68, § 7 of the Constitution of Belgium of May 5, 1993 which is to be put into concrete terms by a law under the special conditions of Article 1<sup>er</sup>, last section. Belgium was not chosen as subject of a comparative analysis in spite of the fact that in a few years it has moved from being from a centralist to a federalist state, and is therefore an avantgarde in constitutional policy. That this could occur in the framework of (an even intensified) European Integration is, in my opinion, a good example of the openness of the European Union as regards internal constitutional questions of Member States<sup>115</sup>. However, the novelty of these fundamental changes as well as the uncertainty of the future development of Belgium make a clear assessment very difficult. The substitutive powers foreseen in the Dutch Municipalities and Provinces Act<sup>116</sup> are not dealt with because of the different position of these entities compared with the regions in the three states in question.

Germany and Italy are founding members of the European Community. Austria has member of the EEA as an EFTA-state (since January 1, 1994) and has joined the European Union on January 1, 1995. So two 'old' members will be compared to a brand new one. The Austrian (albeit short) EEA membership (on the EFTA-side) allows to integrate some experiences as regards the implementation of EEA law.

Germany is always quoted as an example for a well-established and advanced federalism. Austria could, in brief, be characterised as a developing federal system. Still in the 1950s *Wheare* had argued:

(...) There was a sphere, it is true, where the federal principle applied and to this extent Austria had a federal constitution. But this sphere was so small, and, after a constitutional

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<sup>113</sup>Devolution is here understood as a shift of competence because of inertia of the former competent authority. - Compare: *Adamowich/Funk*, Österreichisches Verwaltungsrecht, 321.

<sup>114</sup>"The context-ignorant comparativist is likely to be wrong, however, in the interpretation and, in its wake, in the explanation." - *Sartori*, Comparing and Miscomparing, *Journal of Theoretical Politics* 1991, 253

<sup>115</sup>This thesis cannot deal with the question of how far the domestic process was influenced by further integration in comparison to internal incentives.

<sup>116</sup>I want to thank the *Raad van der Staate*, the *Ministerie van Binnenlandse Zaken* and particularly *Mr.A.Ch.M.Ryron*, Ministry of Home Affairs, for their cooperation.



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amendment of 1929, so insignificant, that there is little experience to be discovered from Austria of the working of federal government.<sup>117</sup>

In the course of this study it will become apparent that his judgement can no longer be justified in the 1990s.

Where the Italian 'federalising-process' might lead to, seems to be more incertain than before 'tangentopoli' and the so-called 'end of the first republic'. However, also the Italian model of a central states' substitutive power in a regionalist context - which is probably destined to become legal history - could be of some comparative value. If only it might be perceived as an outstanding example of continuity of patterns of behaviour and persistency of 'administrative-culture'. If these effects were decisive in the last quarter of a century, it would be likely that they are destined to play a prominent role also in the 'second republic'.

Third, it has been said that "the political culture of the country (i.e. of Austria) usually places a great deal of emphasis on legality and legal regulations"<sup>118</sup>. That substitutive competences were embodied in Austria on the constitutional level might be understood also in this light. However, in the last years we can witness that a material understanding of law has become more important in Austria. The Austrian Constitutional Court (*Verfassungsgerichtshof*) - emphasising its *judicial self-restraint* - has switched to a more substantive interpretation of the Federal-Constitutional Law, which is to be seen in some famous cases<sup>119</sup>. A thinking in formalistic categories of law has remained much stronger in the Italian case. The formal complexity of the Italian provision regarding substitutive action is undoubtedly unique. In Germany, on the other hand, doctrine and in particular the Federal Constitutional Court have traditionally stressed questions of content and played a more active role.

A fourth aspect is the different position of substitutive competences in the legal system of the three states: the substitutive power is based on an unwritten constitutional principle (the federal-comity) in Germany, on a provision in the constitution in Austria and an article on only statutory level in Italy. This aspect, which to me seems significant because of the divergent attitudes towards a constitution, and because it is one of a hierarchical structure of sources of law (*Stufenbau der Rechtsordnung*<sup>120</sup>), merits further consideration.

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<sup>117</sup>Wheare, *Federal Government*, Third Edition, London: 1953, 24f.

<sup>118</sup>Gerlich/Müller, *Austria: Routine and Ritual*, in: *Blondel/Müller-Rommel* (Ed.), *Cabinets in Western Europe*, 138; Compare also Article 18[1] B-VG: The entire public administration shall be based on law.

<sup>119</sup>See only VfSlg 8871/1980 "*Witwerpension*" that forced parliament to introduce a "widowers' pension".

<sup>120</sup>Merkel, *Allgemeines Verwaltungsrecht*, Wien: 1927, 172.



## 4.1. The liability of the Member States

The most common argument<sup>121</sup> in favour of a *substitutive power* of 'central institutions' vis-à-vis sub-national units is the international responsibility of the state, i.e. in the framework of European Integration the individual Member States can be brought before the European Court of Justice according to Article 169-171 EC Treaty. Judicial responsibility on the part of the regions, however, for failure in this context does not exist.

In Switzerland the problems connected with an internal separation of authorities (i.e. between the *Bund* and the *Kantone*) and the responsibility of the *Bund* in the framework of European Integration have been broadly discussed. Daniel Thürer and Philippe Weber<sup>122</sup> argued that in the case of persistent non-compliance with ECJ-judgements on the part of a *Kanton* the competences could devolve to the *Bund*. A means of obliging a *Kanton* to carry out its duty would be *federal execution* (Article 85, Number 8 BV) and especially substitutive action<sup>123</sup>. They only refer to a possible condemnation of Switzerland by the ECJ<sup>124</sup>, and emphasise that such a substitutive action should only be taken as an *ultima ratio*, after all other available legal (and also non-legal) means have been brought to bear on the *Kantone*.

In Italy the Constitutional Court argued that the state which is the only responsible subject vis-à-vis the Community would be *completely disarmed* without such a substitutive competence<sup>125</sup>.

Was 'international responsibility' a sufficient basis to legitimise substitutive powers and were the possible consequences for Member States really serious enough to plead for additional powers of central institutions?

No doubt, from an integration perspective the failure to implement European law is a serious matter (which becomes even more serious if it concerns a judgement of the ECJ)<sup>126</sup><sup>127</sup>

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<sup>121</sup>See, for example: Riegel, Überlegungen zum Problem EG-Richtlinien und nationale Rahmenkompetenz, EuR 1976, 86; Riegel, Gliedstaatkompetenzen im Bundesstaat und Europäisches Gemeinschaftsrecht, DVBl 1979, 248 who, however, in this article put the main emphasis on a jeopardizing of the Community in this article.; Schwan, Die deutschen Bundesländer im Entscheidungssystem der Europäischen Gemeinschaften, 155; Jooss/Scheuerle, Die bundesstaatliche Ordnung im Integrationsprozeß, EuR 1989, 232; Kössinger, Die Durchführung des Europäischen Gemeinschaftsrechts im Bundesstaat, 37; implicit: Zulegg, Die Stellung der Länder und Regionen im europäischen Integrationsprozeß, DVBl 1992, 1332 FN 43; Hessel/Mortelmans, Dezentralized Government and Community Law: Conflicting Institutional Developments?, CML Rev 1993, 930f.

<sup>122</sup>Thürer/Weber, Zur Durchführung von Europäischem Gemeinschaftsrecht durch die Gliedstaaten eines Bundesstaates, Schweizerisches Zentralblatt für Staats- und Verwaltungsrecht 1991, 431-465, particularly 461ff.

<sup>123</sup>Schindler proposed a power of the Bund to transpose European law in case of urgency and stressed the parallelism with the implementation of state treaties. - Schindler, Verfassungsrecht in: Schindler/Hertig/Kellenberger/Thürer/Zäch(Hrsg.), Die Europaverträglichkeit des Schweizerischen Rechtes/ Le droit suisse et le droit communautaire: convergences et divergences, 29; See also: Epiney, Der Stellenwert des Europäischen Gemeinschaftsrechts in den Integrationsverträgen, LL.M. Thesis Florence 1992, FN 161.

<sup>124</sup>See also: Majer, Rechtsprobleme beim Vollzug von EG- und EWR-Recht im Bundesstaat am Modellfall der Schweiz, EuGRZ 1992, 525.

<sup>125</sup>CC sentenza 22 luglio 1976, n.182 ("Agriculture-Community-Directives"), Giur.Cost. 1976 I, 1138ff.

<sup>126</sup>ECJ Case 131/84 (Commission v Italian Republic), ECR 1985, 3531.





From the point of view of the single Member States the situation seemed to be different: for a long period the price to pay for the failure to transpose a Directive was non-existent or minimal. It consisted of a mere declaration that the Member State had breached the law<sup>128</sup>. It is a basic feature of the Community as a 'community of law'<sup>129</sup> that it does not have means of coercing the Member States or its organs. The Treaty of Rome does not expressly provide for any effective sanction against a state which fails to temper its obligations (to the detriment of those which do)<sup>130</sup>. The Commission has no power to issue orders addressed to state organs (as in the case of indirect administration or when state organs act as agents of the federation in some federal systems<sup>131</sup>) or to substitute the competent state organs. The Commission's interference in the internal process is limited to being able to contact<sup>132</sup> state organs for the purpose of collecting information and to check the performance of the tasks entrusted to it. In the case of non-compliance with European law the Commission might only then initiate proceedings before the ECJ. Following a *top down approach* it is the Court and its (declaratory) judgements that are of central importance for improving compliance with European law.

Focusing attention on the record of the Italian Republic as regards infringements of European law<sup>133</sup>, one can come to the conclusion that the Republic has not taken its duty and responsibility seriously enough. Certainly not seriously enough to use it as an argument for founding a(n additional) substitutive power vis-à-vis 'awkward' regions. Here the contradiction between emphasising the responsibility of the state on the one hand and the 'neglectful' practice on the other becomes particularly visible. The inescapable conclusion that emerges from the Italian case is that the 'responsibility-argumentation' can be and has been in fact used to cover diverse interests and other argumentations. These interests and argumentations will be considered further in the chapter entitled 'Italy-the patriarchal solution'. However, in this more general context the Italian case shows that it is not sufficient to rely only on 'international responsibility' in order to legitimise a substitutive competence.

One might now argue that this responsibility has recently become more relevant because of the new provisions in the Treaty on European Union amending Article 171 (Section 2) EC Treaty that allow the Court of Justice to impose a *lump sum* and *penalty payments* on Member States who fail to comply with Court judgements when they are found to be in

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<sup>127</sup>Compare Chapter I.4.3. which is devoted to the question of whether substitutive powers are an idoneous means to promote compliance with European Law.

<sup>128</sup>The fact that the unsuccessful party is ordered to pay the costs under Article 69, Section 2 of the Rules of Procedure cannot be considered as a sanction but only as the natural result of its being unsuccessful.

<sup>129</sup>Hallstein, *Die Europäische Gemeinschaft*, 5. Auflage, 1979, 51ff.

<sup>130</sup>Coppel, *Individual Enforcement of Community Law: The Future of the Francovich Remedy*, EUI Working Paper LAW No.93/6, FN 14 quoting the ECJ.

<sup>131</sup>Compare II.3.; For the German 'Auftragsverwaltung' see Article 84 GG.

<sup>132</sup>Daig/Schmidt in: Groeben/Thiesing/Ehlermann, *Kommentar zum EG-Vertrag* Bd 4, Art 189, Rndz 40; Geiger, *EG-Vertrag*, Art 189, Rndz 10.

<sup>133</sup>See: Commission, Tenth annual report on the monitoring of the application of Community law 1992, COM(93) 320 final, p 152, suspected infringements: Italy: 1988-245; 1989-285; 1990-255; 1991-175; 1992-207; With the exception of 1991 (fourth) Italy has always been among the 'top three' in the ranking of infringements.



breach of their Community obligations. These provisions aim to improve the implementation of Court judgements that, due to their declaratory character, are not enforceable<sup>134</sup>. It has been rightly pointed out that the omission of sanctions to compel states to fulfil their obligations had posed a real threat to the uniform application of Community law, indeed to the Community's very existence<sup>135</sup>.

The introduction of penalty payment and lump sum into the EC Treaty is undoubtedly - like the *Francovich* judgement - a big normative step forward in European Law but, in my opinion, does not fundamentally change the situation of responsibility as regards the relationship between state and sub-national entities. First, because penalty payment as well as lump sum only concern the second procedure (the ECJ has just declared that the Member State has not fulfilled its obligations out of the treaty), and are therefore only imposed in a minor number of cases. Second, because the state upon which a lump sum or a penalty payment is imposed can have this payment refunded by the sub-national unit that is - again according to the national legal system - responsible for the non-implementation of a Court judgement. Such a refundation is, for example, foreseen in Article 12, Section 2 of the agreement between the Austrian Bund and the Länder regarding the decision making process in European affairs [BGBl 775/1992, see Appendix III]. One might thus argue that in this case an, albeit indirect, financial liability of regions for non-compliance with European law came into being with the Maastricht Treaty. If states can pass on penalties to regions, they now have an additional sanction vis-à-vis regions. Admittedly it should not be forgotten that in democracies like Germany<sup>136</sup> and Austria where policy tends to be the result of bargaining between several actors (in our case the actors of the national and the regional level) such a passing on might also become an object of bargaining (as fiscal questions are in one way or another in federal systems).

Another case where regions could now be made financially liable for the non-implementation of European law is the *Francovich* case<sup>137</sup>, that as an individual enforcement action could be understood as complement of the Article 169 enforcement action and that could be comprehended as shaping the *grass roots approach*<sup>138</sup>. The ECJ stated:

In the case that a Member State which fails to fulfil its obligation under the third paragraph of Article 189 (...) there should be a right to reparation where three conditions are met, that is to say, first, that the result prescribed by the directive should entail the grant of rights to individuals; secondly that it should be possible to identify the content of those rights on the basis of the provisions of the directive; and thirdly, that there should be a causal link

<sup>134</sup>Geiger, Kommentar zum EG-Vertrag, Art 171, Rndz 12.

<sup>135</sup>Steiner, From direct effects to *Francovich*: shifting means of enforcement of Community Law, ELR 1993, 3.

<sup>136</sup>A recent study significantly described the path from a 'chancellor-democracy' to a 'coordination-democracy'. - Jäger, Wer regiert Deutschland? Innenansichten der Parteiendemokratie., Zürich,/Osnabrück: 1994.

<sup>137</sup>ECJ Case 6/90 and 9/90 "*Francovich*" (Reference for a preliminary ruling from the Preture of Vicenza and Bassano di Grappa), ECR 1991, 5357; ECJ Case 22/87 "Protection of employees - employer's insolvency" (Commission v Italy), ECR 1989, 143; For the *Francovich* case see, for example: Coppel, Individual Enforcement of Community Law: The Future of the *Francovich* Remedy, EUI Working Paper LAW No. 93/6.

<sup>138</sup>Ehlermann, Die Europäische Gemeinschaft, das Recht und die Juristen, NJW 1992, 1859.



between the breach of the State's obligation and the loss and damage suffered by the injured parties.

In the absence of any Community legislation, it is in accordance with the rules of national liability that the State must make reparation for the consequences of the loss and damage caused.<sup>139</sup>

The *Francovich-case* is undoubtedly of enormous constitutional significance for the Community and its approach certainly provides strong encouragement for the Member States to implement directives within the prescribed periods<sup>140</sup>. In our context it is important that the judgement refers to domestic law according to which - in the absence of any Community legislation - the loss and damage is to be obtained. "Nevertheless", the Court stated that:

"the relevant substantive and procedural conditions laid down by the national law of the Member States must not be less favourable than those relating to similar domestic claims and must not be so framed as to make it virtually impossible or excessively difficult to obtain reparation."<sup>141</sup>

Advocate General *Mischo* said:

That means at least that the most appropriate remedies existing in the national legal system must be interpreted in such a manner as to comply with those requirements, and even that an appropriate remedy must be created if it does not exist.<sup>142</sup>

Regarding the Austrian situation this means that *Länder* as entities<sup>143</sup> (*Rechtsträger*) could be made liable according to the rules of public liability (Article 23 B-VG, Art 1 Amtshaftungsgesetz BGBl 1949/20) for their organs. Article 23, Section 1 B-VG states:

The Federation, the *Länder*, the districts, the communes and other public law corporations and institutions are liable to whomever for any damage caused by persons acting as their organs in execution of laws by illegal behaviour.

As in Germany (Article 34 GG<sup>144</sup>) the rules of public liability do not foresee a *liability for legislative default* till now. In the *von Colson case* the ECJ had stated that national courts must guarantee real and effective protection<sup>145</sup> for individuals' Community rights. It follows that

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<sup>139</sup>ECJ Case 6/90 and 9/90 "Francovich" (Reference for a preliminary ruling from the Preture of Vicenza and Bassano di Grappa), ECR, 5359.

<sup>140</sup>Opinion of Advocate General *Mischo* - ECJ Case 6/90 and 9/90, ECR 1991, 5402.

<sup>141</sup>ECJ Case 6/90 and 9/90 "Francovich" (Reference for a preliminary ruling from the Preture of Vicenza and Bassano di Grappa), ECR, 5359.

<sup>142</sup>Opinion of Advocate General *Mischo* - ECJ Case 6/90 and 9/90, ECR 1991, 5380; Compare: 'It is for the national courts, in application of the principle of cooperation laid down in Article 5 of the EEC Treaty, to ensure the legal protection which persons derive from the direct effect of provisions of Community law.' - ECJ Case 213/89 *The Queen v Secretary of State for Transport, ex parte: Factortame Ltd* (reference for a preliminary ruling by the House of Lords), ECR 1990, 2433.

<sup>143</sup>Also the districts, municipalities and corporations of public law. - Compare Article 1 *Amtshaftungsgesetz* (public liability law).

<sup>144</sup>If any person, in the exercise of a public office entrusted to him, violates a third party, liability shall rest in principle on the state or the public body which employs him.

<sup>145</sup>ECJ *von Colson v Land Nordrhein Westfalen* (reference for a preliminary ruling from the Arbeitsgericht Hamm), ECR 1984, 1891

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'the national court is required to interpret its national law in the light of the wording and the purpose of the directive'<sup>146</sup>. If, in our case, the national rules of liability of public authorities could not be interpreted in such a manner as to comply with the requirements of *Francovich* (which is very likely), then the Austrian judge must 'create an appropriate remedy'. The judge would therefore have to apply only the procedural provisions of the public liability law (*Amtshaftungsgesetz*) filling them with the substantive content of the *Francovich*-judgement. Thus, one conclusion that emerges from *Francovich* is that the Austrian<sup>147</sup> (and the German<sup>148</sup>) rules of public liability should be revised in order to complete them with a liability for legislative default<sup>149</sup>. These steps towards the gradual reshaping of national remedies can be viewed as an (...) element in the Community liability system<sup>150</sup>. Notwithstanding the consequences of *Francovich* for the domestic public liability law sketched out above, we should be aware that the ECJ would always declare the Member State responsible.

It might be argued that extending public liability on legislative default would counteract the concept of parliamentary sovereignty. As far as legislative default in the framework of European Integration is concerned, the constraints for national parliament's autonomy seem to me not only unavoidable but also legitimised: Not by case have the profound changes that the concept of parliamentary sovereignty has to undergo within the integration process been stressed on several occasions<sup>151</sup>. In addition, the existing internal participation-models of (national and regional) parliaments at the comunitarian law-making process should be taken into account. Overall, relying on legislature's freedom of discretion is inappropriate in the case of European Integration because:

The acts or omissions for which states will be liable under *Francovich* will not involve the exercise of discretion. A failure to achieve the ends required by a directive is a matter in which a state has no discretion. As Advocate general Mischo commented in *Francovich*, "as

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<sup>146</sup>See FN 112; See also: ECJ Case 106/89 *Marleasing SA v La Comercial Internacional de Alimentación* (reference for a preliminary ruling by the Juzgado de Primera Instancia e Instrucción, Oviedo, Spain), ECR 1990, 4158f.

<sup>147</sup>*Funk* pleaded for an amendment. - *Funk*, Die bevorstehende Öffnung Österreichs in den Europäischen Wirtschaftsraum und in die Europäischen Gemeinschaften, Referat am 12.ÖJT 1994, 27.

<sup>148</sup>For Germany, see: *Häde*, Staatshaftung für legislatives Unterlassen, BayVBl 1992, 449.

<sup>149</sup>Steiner argued that 'unless a right in respect of such acts (i.e.wrongful acts or omission by act of parliament) is admitted in all Member States the effective application of *Francovich* will be seriously undermined'. - *Steiner*, From direct effects to *Francovich*: shifting means of enforcement of Community Law, MLR 1993, 14; Another question, beyond this paper's scope, concerns the need for culpability. While culpability is a precondition in the Austrian law of public liability even merely accidental failures to transpose directives would, according to *Francovich*, create liability.

<sup>150</sup>*Snyder*, The Effectiveness of European Community Law: Institutions, Processes, Tools and Techniques, MLR 1993, 46

<sup>151</sup>See: *MacCormick*, Beyond the Sovereign State, MLR 1993, 16: "(...) it seems obvious that no state in Western Europe any longer is a sovereign state. (...) Where at some time past there were, or may have been, sovereign states, there has now been a pooling or a fusion within the communitarian normative order of some of the states' powers of legislation, adjudication and implementation of law in relation to a wide but restricted range of subjects. (...) We must not envisage sovereignty as the object of some kind of a zero sum game, such that the moment X loses it Y necessarily has it."; *Christiansen*, European Integration Between Political Science and International Relations Theory: The End of Sovereignty, EUI Working Paper RSC No.94/4.





far as implementation of Directives is concerned the legislature is in a situation similar to an administration under an obligation to implement a law".<sup>152</sup>

A third situation where sub-national units could be subject to a claim is the case of direct applicability of directives. It has just been said that in this case recognised classifications tend to break down<sup>153</sup>, or, in other words, that 'the clear cut distinction between regulations and directives implied in the Treaty has been blurred'<sup>154</sup>. Although distinguishable from regulations in that they are addressed to the Member States and not to the entirety of Union Citizens directive might 'produce direct effects in the relations between the Member States and their citizens (and create for the latter the right to enforce them before the courts)'<sup>155</sup>.

In the *van Duyn* case the ECJ stated that 'if the obligation imposed on Member States is clear and precise (....), the rule (i.e. provision of the directive) is sufficient in itself and the provision confers on Community national rights then these rights are enforceable by them in the national courts'<sup>156</sup>. It was the principle of *effet utile* that was the rationale of *van Duyn*. Until then the reasoning of the Court had been constant<sup>157</sup> and individuals could rely on provisions of directives (after the expiration of the deadline for transposition of the provisions of the directive into the internal legal order of the Member States<sup>158</sup>) that were sufficiently clear and unconditional before a national court, if a directive was either not timely or had not been transposed correctly into domestic law by the competent authorities. This was - as *Curtin* argued - theoretically underpinned by the notion of a 'Community estoppel'<sup>159</sup>, namely that Member States should not be able to rely on their own failure to implement.

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<sup>152</sup>*Steiner*, From direct effects to Francovich: shifting means of enforcement of Community Law, ELR 1993, 16; See also my argumentation on page 13.

<sup>153</sup>Compare FN 78 ff.

<sup>154</sup>*Lasok/Bridge*, Law & Institutions of the European Communities, 4.Ed., London: 1987, 126; See for example: *Wägenbaur*, Ist die Unterscheidung zwischen Verordnungen, Richtlinien und Entscheidungen nach Artikel 189 EWG-Vertrag hinfällig geworden, DVBl 1972, 244; '(...) legal rules by their very nature have a practical purpose. (...) The non-operation of a rule of law appears thus to be not an ordinary phenomenon, but a real antinomy in the legal system. In other words, 'direct effect' must be presumed, it has not to be established a priori. To return to medical comparisons, I would say that 'direct effect' is the normal state of health of the law; it is only the absence of direct effect which causes concern and calls for the attention of legal doctors.' - *Pescatore*, The Doctrine of 'Direct Effect': An Infant Disease of Community Law, ELR 1983, 155.

<sup>155</sup>ECJ Case 9/70, ECR 1979, 837.

<sup>156</sup>ECJ Case 41/74 *van Duyn v Home Office* (preliminary ruling requested by the Chancery Division of the High Court of Justice), ECR 1974, 1356; Compare just: ECJ Case 9/70 *Grad v Finanzamt Traunstein* (reference for a preliminary ruling by the Finanzgericht München), ECR 1970, 825: "(...) the effectiveness ('*effet utile*') of such a measure would be weakened if the nationals of that State could not invoke it in the courts and the national courts could not take it into consideration as part of Community law."

<sup>157</sup>See: *Everling*, Zur direkten innerstaatlichen Wirkung der EG-Richtlinien: Ein Beispiel richterlicher Rechtsfortbildung auf der Basis gemeinsamer Rechtsgrundsätze in: *Börner/Jahrreiß/Stern*, Einigkeit und Recht und Freiheit - Festschrift Carstens, Bd 1, 95-113

<sup>158</sup>ECJ Case 148/78 *Pubblico Ministero v Tullio Ratti* (preliminary ruling requested by the Pretura Penale, Milan), ECR 1979, 1630

<sup>159</sup>*Curtin*, The Province of Government: Delimiting the Direct Effect of Directives in the Common Law Context, ELR 1990, 196f, 199 quoting Lord *Donaldson*; See but: *Pescatore*, The Doctrine of 'Direct Effect': An Infant Disease in Community Law, ELR 1983, 169.



In the *Marshall case* the ECJ stated 'that a directive may not of itself impose obligations on an individual and (...) a provision of a directive may not be relied upon as such against such a person'<sup>160</sup>. Thus a directive could have a direct effect only in the relation individual vis-à-vis 'the state' and not vice versa. A horizontal effect is thereby, in general, precluded<sup>161</sup>. The direct effect of directives is confined to the vertical plane and does not exist in 'relation to third parties (*Drittwirkung*)'<sup>162</sup>. Direct effect of directives should, however, be related to all emanations of the state, including a state authority<sup>163</sup> acting as employer. In 'recognising the unity of public authority'<sup>164</sup> the ECJ applied a very wide interpretation of bodies that constitute 'the state' for the purposes of a Community estoppel<sup>165</sup>. In *Fratelli Costanzo* the ECJ ruled in the context of the direct effect of directives that the state was to be understood as 'all organs of the administration, including the decentralised authorities'<sup>166</sup>. Thus, from the viewpoint of European Law as well as national law, (independent) sub-national units constitute emanations of the state<sup>167</sup> (and this also in their quality of employers), so that a Union citizen can rely upon unimplemented, but directly applicable, directives against regional entities in the national courts.

To sum up: first, a Member State that is brought before the ECJ under Article 171 EC Treaty for the non-implementation of a Court judgement by one of its sub-national units can, according to domestic law, have this payment refunded by the responsible region (when this possibility is foreseen). Second, according to *Francoovich*, regions can be made liable under the domestic rules of public authority liability (which should either be interpreted in the sense of the wording or be amended in order to extend them to defaults of the legislative branch). Third, individuals might rely on provisions of an unimplemented directive in national courts

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<sup>160</sup>ECJ Case 152/84 *Marshall v Health Authority* (preliminary ruling requested by the Court of Appeal of England and Wales), ECR 1986, 749.

<sup>161</sup>Such an effect could only be achieved by a 'back-door interpretative method'. This, however, requires the existence of a national legislation which is - albeit ambiguous - capable to be interpreted. Then national courts could give provisions of directives an (indirect) impact on horizontal legal relations. See: *Steiner*, The province of Government: Delimiting the Direct Effect of Directives in the Common Law Context, ELR 1990, 220ff.

<sup>162</sup>Compare also ECJ Case 14/83 *von Colson v Land Nordrhein-Westfalen* (reference for a preliminary ruling from the *Arbeitsgericht Hamm*), ECR 1984, 1901; The recognition that a directive could, under certain conditions, have vertical direct effect 'formed the first plank in the judicial liability system'. - *Snyder*, The Effectiveness of European Community Law: Institutions, Processes, Tools and Techniques, MLR 1993, 40.

<sup>163</sup>For the debate and the criteria of a delimitation of public authorities, especially in Great Britain and Ireland, see: *Curtin*, The Province of Government: Delimiting the Direct Effect of Directives in the Common Law Context, ELR 1990, 200ff: The concept of 'public authority' (...regardless of the capacity in which the latter - the state - is acting, whether employer or public authority...) upheld by the ECJ in the *Marshall case* is, in fact, very loose. It will be no easy task to reconcile the different concepts of public authority existing in the Member States according to criteria such as public and private company with state participation ('national airlines') or sufficiently close links, structural or otherwise: for example, bodies that regulate profession or business, 'quasi non-governmental institutions' or universities.

<sup>164</sup>ECJ Case 14/83 *von Colson v Land Nordrhein Westfalen* (reference for a preliminary ruling from the *Arbeitsgericht Hamm*), ECR 1984, 1900.

<sup>165</sup>See FN 159.

<sup>166</sup>ECJ Case 103/88 *Fratelli Costanzo Spa v Comune di Milano* (reference for a preliminary ruling from the *Tribunale amministrativo regionale per la Lombardia*, Italy), ECR 1989, 1839f.

<sup>167</sup>Compare also Article 2 of Council Directive 80/723/EEC on the transparency of financial relations between Member States and public undertakings where 'public authorities' were defined as 'the State and regional or local authorities'. - OJ L 195/36.



against regions (as emanations of the state) according to the constant jurisprudence of the ECJ. This possibility, however, existed before November 19, 1991 and November 1, 1993 (i.e. the *Francovich* judgement of the ECJ and the entering into force of the Maastricht Treaty).

Thus, what we are facing today is that a combination of European law and national law leads to a much more complex system of responsibilities and (financial) liabilities than claimed by the advocates of states' *substitutive powers*. Besides the traditional scheme of the international responsibility of a state, a variety of possibilities exist to make regions (directly or indirectly) also liable for failure to implement provisions of European law. It should be added at this point that increasing liability goes hand in hand with an ever growing participation of regions at the decision-making process on European affairs. However, from a merely formal point of view the international responsibility of the (Member) State remains a valid argument for the legitimisation of a substitutive power. In substance, however, the situation of *de facto* responsibilities is - as shown in this sub-chapter - too complex to allow for such a simple solution. It remains to be seen whether there are other arguments that justify a substitutive power of the state vis-à-vis regions.

## 4.2. Community policy: Foreign policy or 'home affairs'?

Advocates of a centralised competence for the states in the field of European Integration have also put forward the argument that these matters would fall within the competence of foreign affairs. In Italy this argument was used at the beginning of the 1970s to maintain the central state's power to transpose directives and implement regulations in the field of regions' competences<sup>168</sup>. A similar discussion took place in Germany in the 1950s when the *Bund* (and the *Land* Berlin) sought to derive from the *Bund*'s power to conclude international treaties (Article 32, Section 1 GG) its own power to transpose and implement foreign policy<sup>169</sup>.

Since then the situation has changed significantly: sub-national units now implement and transpose international treaties as well as European law. Despite the above-mentioned debate in Germany, this task was entrusted to the *Länder*. In Italy Article 6 of d.P.R. n.616/1977 finally transferred the competence to implement regulations and transpose directives to the regions. After much discussions this was accepted by the Italian Constitutional Court<sup>170</sup>.

The power to implement also has another side: in Austria, Article 16, Section 4 B-VG states that "the *Länder* are obliged to take the measures necessary to implement international

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<sup>168</sup>d.P.R. n.10/1972 and d.P.R. n.11/1972; Corte Costituzionale sentenza n.142/1972, Giur. Cost. 1972, 1432; See II.2.

<sup>169</sup>*Fastenrath*, Kompetenzverteilung im Bereich der auswärtigen Gewalt, München: Beck, 1986, 115ff; This argument was also made by *Birke* in the mid-sixties. See: *Birke*, Die deutschen Bundesländer, 78; Compare also Chapter II. 1.2.

<sup>170</sup>Corte Costituzionale sentenze n.304/1987, n.433/1987, n.632/1988.



treaties in their independent domain"<sup>171</sup>. In the case of non-timely compliance with this duty the state has a substitutive power. The Bund's substitutive power 'in the framework of European Integration' was to be modelled on this provision<sup>172</sup>. Sub-national units today have a (limited) powers to conclude treaties<sup>173</sup> or even to confer sovereign powers to (adjacent) institutions<sup>174</sup>. Thus it can be seen that foreign relations in the context of federal state models<sup>175</sup> have become far more complex. Political scientists questioned the traditional model of foreign policy as early as the 1960s<sup>176</sup>, stressing that the foreign policy at *Montesquieu's*<sup>177</sup> times has little to do with today's foreign policy. Yet we are confronted with massive mutual interferences of the states as regards economy, human rights, environment, to list only some important fields<sup>178</sup>. In addition the role of the state as such has significantly changed: it has become a modern welfare state broad tasks (*Sozialstaat*).

The interferences are even clearer in the field of European Integration. To quote *Neil MacCormick*:

Where at some time past there were, or may have been, sovereign states, there has now been a pooling or a fusion within the communitarian normative order of some of the states' powers of legislation, adjudication and implementation of law in relation to a wide but restricted range of subjects.<sup>179</sup>

What we are facing in the context of European Integration is a sort of 'melange' of legislative, judicial and administrative action at various levels. European policy can no longer be seen as classic foreign policy anymore, according also to the German *Länder*<sup>180</sup>. Rather it could be classified as 'European home affairs'<sup>181</sup>.

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<sup>171</sup>Version according to Article I Z 3 B-VG 1992/276.

<sup>172</sup>Compare II.3.; Appendix III - Article 23d, Section 5 B-VG (BGBl 1994/1013).

<sup>173</sup>See, for example: Germany - Article 32, Section 3 GG; Austria - Article 16, Section 1 B-VG; Belgium Article 68, § 1<sup>er</sup> Constitution fédérale du 5 mai 1993.

<sup>174</sup>Germany: Article 24, Section 1a GG.

<sup>175</sup>For this topic see the exhaustive study of *Renaud Dehousse*, *Fédéralisme et relations internationales*, Bruxelles: Bruylant, 1991, revised version of Ph.D. Thesis, EUI Florence, 1988.

<sup>176</sup>*Krippendorff*, *Ist Außenpolitik Außenpolitik?*, PVS 1963, 243-266.

<sup>177</sup>According to whom executive power was defined as follows: '(...) he makes peace and war, sends or receives embassies, establishes security, and prevents invasions' - *Montesquieu*, *De l' esprit des lois*, 1748, Book 11, Chapter 6 - english translation in: *Cohler ed al, Montesquieu - The Spirit of the Laws*, Cambridge University Press: 1989.

<sup>178</sup>Writers, politicians and the course of international affairs remind us constantly that politics everywhere is connected with politics everywhere else. Through a variety of processes and channels, power is now exercised at a global level in a variety of spheres and with a bewildering variety of political effects. (...) This process of extension has had its effect not only on the empirical reality of world politics but also on the way analysts and practitioners conceive of the global arena.' - *Smith*, *Modernization, Globalization and the Nation-State*, in: *McGrew/Lewis* [Ed.], *Global Politics - Globalisation and the Nation State*, Cambridge: Polity Press, 1992.

<sup>179</sup>*MacCormick*, *Beyond the Sovereign State*, MLR 1993, 16; Compare also: *Obradovic*, *Community Law and the Doctrine of Divisible Sovereignty*, *IJoEI* 1993, 1-20.

<sup>180</sup>See for example: *Wolfgang Clement*, Minister of Nordrhein-Westphalia, *Der Spiegel* 13/1992, 68; *Der Spiegel* 46/1992, 37.

<sup>181</sup>For this term see: *Spinner*, *Das Abkommen über den Europäischen Wirtschaftsraum im Lichte der schweizerischen Integrationspolitik*, in: *Jacot-Guillarmod* (éd.), *Accord EEE - Commentaires et réflexions*, 42.





The participation of German Länder in the internal decision-making process (now enshrined in Article 23, Section 2 to 7 GG) on European affairs was characterised as 'a step in the decentralisation and federalisation of foreign and European policy'<sup>182</sup>. The same is true of Article 146 and 198a EC Treaty.

One might remember *Jaques Delors'* well-known dictum that in a few years up to 80% of Member States' economic and social regulation will be determined by the European Community. Europeanization (and globalisation), however, does not stop at this point: there are, for example, environmental questions to be considered (130r EC Treaty). It is obvious that this ever growing field of activities cannot be left up to a *corps diplomatique*. Neither European nor foreign are monopolised by the Ministry of Foreign Affairs in any Member State. Striking proof of this are the journeys of ministers, *Land* ministers and parliamentarians abroad or the creation of *Land* offices<sup>183</sup> (*Länderbüros*) in Brussels. Both vertically and horizontally many actors participate in European coordination, the needs for which 'have gone far beyond the capacity for hierarchical coordination within the framework of the nation-state'<sup>184</sup>.

After the positive result in the Austrian referendum of June 12, 1994, a debate started over who should coordinate European Integration within the government: the Chancellery or the Ministry of Foreign Affairs<sup>185</sup>. It has been argued that European Integration 'constitutes domestic policy transferred to the comunitarian level' and would as such 'fall under the category of general governmental policy (*allgemeine Regierungspolitik*)'<sup>186</sup>. Apart from the fact that this political quarrel shows the importance attributed to European policy by a new Member State, it again gives evidence that European Integration policy (with the broad areas it comprises) cannot by definition, be the prerogative of one institution: it would be presumptuous to predict the final outcome of the Austrian controversy over 'European Integration competences' within the government (e.g. to prognosticate the creation of an 'Euro-ministry' or an institution modelled on the French *SGCI*). Furthermore the debate will

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<sup>182</sup>Ress, Das deutsche Zustimmungsgesetz zur Einheitlichen Europäischen Akte - Ein Schritt zur "Föderalisierung" der Europapolitik, EuGRZ 1987, 362.

<sup>183</sup>For their constitutional legitimacy and the interpretation of Article 32 GG [foreign policy], see: *Fastenrath*, Länderbüros in Brüssel - Zur Kompetenzverteilung für informales Handeln im auswärtigen Bereich, DÖV 1990, 125ff.

<sup>184</sup>*Scharpf*, Community and Autonomy - Multilevel Policy-Making in the European Union, EUI Working Paper RSC No.94/1; To conceptualise the relationship between the (territorially defined) actors has yet become far more complex than it was in hierarchical systems and than it would be in the ideal-type of a 'round-table' negotiation system: "[...] actors' resources are distributed very unequally, and not all the bargaining includes all the actors. The process implied by the term multilevel governance is to all means and purposes a horizontally as well as vertically asymmetrical negotiating system." - *Christiansen*, Territorial Politics and Multilevel Governance in the European Union: The Case of Wales, 3.

<sup>185</sup>NZZ Fernausgabe Nr.144, 24.Juni 1994, 3; Because the Chancellor, *Vranitzky*, and the Minister of Foreign Affairs, *Mock*, are representatives of the two coalition parties the outcome of this quarrel will depend not least on the new coalition-negotiations after the result of the elections held on October 9, 1994. However, it is likely that there will be a 'divided coordination competence'. Apart from a formal-juridical point of view one has to consider also the strong de facto position of the chancellor in Austrian politics. For the role of the chancellor, especially the trend towards leader-centered recruitment see: *Müller*, Austrian Governmental Institutions: Do They Matter, in: *Luther/Müller*, Politics in Austria - Still a Case of Consociationalism?, 108ff.

<sup>186</sup>*Holzinger*, Die bevorstehende Öffnung Österreichs in den Europäischen Wirtschaftsraum und die Europäischen Gemeinschaften - Gutachten, 187 FN 537; Section A Z 1 of Part 2 of the Enclosure to § 2 of the law on federal ministries (*Bundesministeriengesetz*).

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probably resurface after other elections that change the actual 'balance of power' between the parties. One parameter, however, seems to be fixed - there will be a horizontal division of competences. As regards the vertical dimension we have to consider the internal participation models<sup>187</sup> as well as the participation of regions on the European plane created by the Maastricht Treaty.

The notion of *Bernd-Christian Funk*, 'that in the long run the end of the constitutional state lies in the logic of development'<sup>188</sup> may appear bold but justifiable. Far less visionary is the conclusion that the end of traditional foreign policy (as of sovereignty<sup>189</sup>) lies in the logic of European Integration. Another argument in favour of this perspective is the public discussion about European policy as envisaged by the *Bundesverfassungsgericht* in its judgement of October 12, 1994. Even though according to the judgement a 'European public' would not yet exist<sup>190</sup>, it observed that a democratic debate about European affairs is taking place within the states. This debate has to fulfil certain criteria:

"If democracy is not to remain a formal principle of accountability, it is dependent upon the existence of specific privileged conditions, such as ongoing free interaction of social forces, interests, and ideas, in the course of which political objectives are also clarified and modified (see BVerfGE 5, 85 <135, 198, 205>; 69, 315 <344ff>), and as a result of which public opinion modules political policy."<sup>191</sup>

The form of qualified discussion required by the *Bundesverfassungsgericht* seems to confirm the slogan that 'democracy replaces diplomacy'. Although it is certainly premature to claim 'the end of foreign policy', traditional patterns of foreign policy no longer have the dominant or even solely place in European Integration. An ever more intensified public debate about European affairs, referenda about the Maastricht Treaty in several Member States (and also in states seeking membership i.e. the Scandinavian states and Austria) and fundamental decisions of Constitutional Courts show that European Integration is envisaged much more as a sort of 'home affairs' than as traditional foreign policy. It follows from this assessment that both a power of the state to implement and to transpose European law as well as a power to a *substitutive action*, however framed, cannot be based only on a overcome foreign-policy argumentation.

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<sup>187</sup>See II.3.

<sup>188</sup>*Funk*, Die Entwicklung des Verfassungsrechts, in: *Mantl* (Hrsg.), Politik in Österreich, 706.

<sup>189</sup>Compare *Christiansen*, European Integration Between Political Science and International Relations Theory: The End of Sovereignty, EUI Working Paper RSC No.94/4.

<sup>190</sup>The thought that every process of forming political will can only take place on a relatively homogenous basis - spiritually, socially and politically - which is today the State, goes back to *Hermann Heller*. - *Heller*, Politische Demokratie und soziale Homogenität - Gesammelte Schriften, Bd 2, 1971, 421, 427ff; *Zuleeg*, on the other hand, argued 'that the media shows everyday that an European public does exist' and that 'the framework of the nation-state not necessarily guarantees the absence of problems'. - *Zuleeg*, Demokratie in der Europäischen Gemeinschaft, JZ 1993, 1074; In fact, both depart from pre-legal premises that can more easily be falsified than verified.

<sup>191</sup>BVerfG, Urteil des Zweiten Senats vom 12. Oktober 1993 - 2 BvR 2134/92, 2 BvR 2159/92 - English version in: International Legal Materials 2/1994.

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### 4.3. Substitutive powers: An idoneous means to promote compliance with European Law?

Compliance has been called 'the new challenge for Community law'<sup>192</sup>, due to the fact that the inadequate implementation of directives 'represents not only a drain on the Commission's limited enforcement capacity, but also an obstacle to the credibility of EEC law as a whole and to the creation of the internal market in particular'<sup>193</sup>. In the framework of the Community as well as in the EEA there is a variety of means to promote compliance. The task of this chapter is to evaluate whether substitutive powers could - compared with other means - be an effective instrument in achieving compliance with European law.

Judgements of the ECJ under Article 169 EC Treaty, although for the public the most visible instrument to assure compliance with European law, concerned only 2.4%<sup>194</sup> of the complaints (suspected infringements) in 1990. In 62.5% of the cases a letter of formal notice was sent, in 16.4% a reasoned opinion was delivered and only 5.0% were referred to the ECJ.

As regards the EEA it seems - in the light of the present experiences - likely that the number of suspected infringements that reach the final stage, i.e. a judgement of the EFTA Court<sup>195</sup>, will not be significantly higher (probably even lower) than in the case of the European Community. If one regards the number of more than 1500 norms (about 12 000 pages of the OJ of the EC<sup>196</sup>) that had to be integrated by the EFTA states it is interesting to note that Sweden was able to notify 100%(!!) of the required measures by January 1, 1994. It has been said that this is because the Swedish administration was given clear instructions to fulfil the obligations towards ESA completely<sup>197</sup>. This was admittedly only possible in a system with only one real centre of power. Where there are no significant political actors outside central government, or in the words of *Wildenmann* no 'partial contra-gouvernements'<sup>198</sup> and the power of all public bodies stems from this central source, implementation can (presupposing the political will) quickly be achieved. Other EFTA countries did not fulfil their obligations so perfectly: the first letter of formal notice in the framework of the EEA was sent to Austria, Finland, Iceland and Norway on March 17, 1994. Austrian Länder were concerned in 4 cases, the delays of which are explained as follows:

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<sup>192</sup>Snyder, *The Effectiveness of European Community Law: Institutions, Processes, Tools and Techniques*, MLR 1993, 21.

<sup>193</sup>Anderson, *Inadequate Implementation of EEC Directives: A Roadblock on the Way to 1992?*, Boston College International and Comparative Law Review 1988, 96.

<sup>194</sup>For the following numbers, see: Snyder, *The Effectiveness of European Community Law: Institutions, Processes, Tools and Techniques*, MLR 1993, 29.

<sup>195</sup>The procedure according to Article 31 of the ESA-Court Agreement corresponds broadly to that under Article 169 EC Treaty. The EFTA Surveillance Authority (ESA) plays a role similar to the Commission in the framework of the EEA.

<sup>196</sup>Botschaft des schweizerischen Bundesrates zur Genehmigung des Abkommens über den EWR, 18.5.1992, BR-Drucksache 92.052, I/36 und I/643

<sup>197</sup>Letter from Dr. Maria Berger, Director Specific EEA Affairs - EFTA Surveillance Authority, to the author, July 5, 1994.

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\**awarding of public contracts* - new EC directives (after July 31, 1991) should be integrated

\**sludge in agriculture* - contradictory interests of environment and agriculture have complicated the matter

\**law regarding the civil service (communes and Länder)* and \**legislation concerning health and safety at work* - should be oriented on the *Bund's* law regarding the civil service and health at work<sup>199</sup>

Considering that there were few cases, despite the large number of European norms that had to be integrated in the framework of the EEA, it can be concluded that ESA has 'achieved its goals through cooperation and dialogue'<sup>200</sup>. Reasoned opinions in the framework of the EEA are to be expected only in singular cases, and judgements seem to be even more an *ultima ratio*<sup>201</sup> than in the European Community. As further experience had shown the ESA has received the notifications for practically all directives by June 1, 1994, which made it possible to call off the formal action<sup>202</sup>.

The German *Länder* have also delayed implementing Community directives only in a minor number of cases as can be seen by the following numbers<sup>203</sup>: on January 1, 1994, the Federal Republic had not implemented 137 directives, only 11 of them concern the competences of the *Länder*. In the Saarland, for example, the implementation of 6 directives was delayed. In three of these cases the *Land* was waiting for a *frame-legislation* of the *Bund*, in the other three cases it was inadequate to initiate an own legislation procedure because of the small seize of the matter. According to Regierungsrat Mueller from the Bavarian Ministry for Federal and European Affairs, in the case of the Council Directive 88/48/EEC<sup>204</sup>, regarding the recognition of higher-education diplomas (time-limit: 4.1.1991), the *frame legislation* of the

<sup>198</sup>Rudolf Wildenmann, *Die Rolle des Bundesverfassungsgerichtes und der Deutschen Bundesbank in der politischen Willensbildung*, Stuttgart: Kohlhammer, 1969, 10.

<sup>199</sup>Letter from Dr.Meirer, Direktor der Verbindungsstelle der Bundesländer, to the author, May 26, 1994.

<sup>200</sup>von Hertzen, *Activities of the EFTA Surveillance Authority in the Fields of Capital Movements and Financial Services*, in:EFTA, *Making the EEA Work - Papers delivered at an EFTA workshop in Brussels on 13 October 1993*, 29.

<sup>201</sup>"An infringement procedure would only be initiated when there seemed to be a lack of effort or an unacceptable timetable for adjusting the flawed law, and when it could therefore be expected that such a procedure would actually lead to an improvement in this respect. If, in the interim, economic operators suffered losses, due to a gap in the existing law, the individual Member States concerned might be made liable, as the ECJ had ruled in its judgement in the case Francovich and Bonifaci." - EFTA, *Making the EEA work - Papers delivered at an EFTA Workshop in Brussels on 13 October 1993*, 59f.

<sup>202</sup>EFTA Surveillance Authority, *Semi-Annual Report January-June 1994*, Brussels: 1994, 5, 24: "In general the EFTA States have so far shown great willingness to co-operate and solve the problems before formal procedures had to be invoked."

<sup>203</sup>I want to thank H.Matschiner, Chef der Staatskanzlei - Saarland and Regierungsrat Müller, Bayerisches Staatsministerium für Bundes- und Europaangelegenheiten, for the following information.

<sup>204</sup>Council Directive of 21 December 1988 on a general system for the recognition of higher-education diplomas awarded on completion of professional education and training of at least three years' duration, OJ L 19, 24 January 1989.





*Bund* for the public service (*Beamtenrechtsrahmengesetz*) was only amended on December 20, 1993<sup>205</sup>. One *Land* enacted its legislation in this field only one day later. This empirical information shows, first, that it is not the federal structure of Germany that in first instance can be blamed for delays in the implementation and transposition of EC directives and, second, that a referral to the ECJ is to be expected only in some of the few cases where *Länder* are responsible.

What field of application can therefore remain for a *substitutive power* in this framework where a referral to the ECJ is a spectacular, albeit a rare, *ultima ratio* means? *Substitutive powers* themselves are in general seen as an *ultima ratio* means, as a form of *last resort* of the state vis-à-vis inactive or even awkward regions. In Italy the invoking of the government's *substitutive power* presupposes that the inactivity of the regional authorities is verified (Art. 2 of legge n.382/1975 used the term '*persistent inactivity*'), and that the government - after having heard various institutions - had set a congruent time-limit for the region to provide for measures<sup>206</sup>. In Austria the *Bund* can use its *substitutive power* only after either a judgement of a court in the framework of the European Union. In addition, its *substitutive competence* is - in contrast to the Italian solution - only of temporary character: it automatically loses its force when the *Land* takes the necessary provision. Although this respects more the federalist principle or the principle of subsidiarity it again reduces the theoretical field of application of the *substitutive power*. In Germany the *substitutive power* as a result of the unwritten constitutional *principle of federal comity* is undoubtedly an *ultima ratio* means that is also limited by the *principle of proportionality*<sup>207</sup>. Whether the *substitutive power* is of temporary or permanent character is a contentious point<sup>208</sup>. That a *substitutive action* should be taken only as an *ultima ratio* has also been argued for Switzerland<sup>209</sup>. Given these conditions and criteria, the *substitutive power* seems to be really an *ultima ratio*. If it is perceived as having only temporary character it is even more hypothetical in its practical use. Thus it seems more than doubtful that it can really be an idoneous means of promoting compliance.

Let us now contrast these *substitutive powers* with the means developed on the European level to improve compliance with Community law: The first approach taken by the

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<sup>205</sup>Zehntes Gesetz zur Änderung dienstrechtlicher Vorschriften vom 21.12.1993, dt BGBl 1993 I, 2136ff, particularly § 14 c, § 20a.

<sup>206</sup>Art. 6 d.P.R. n.616/1977 - Compare II.2.

<sup>207</sup>After having used all other (non-legal) means. In this sense e.g.: Grabitz, Die Rechtsetzungsbefugnis von Bund und Ländern bei der Durchführung von Gemeinschaftsrecht, AöR 1986, 32; Although, it has been argued that the area of discretion of the Federal Government would be limited only politically and not legally. - Maunz in: Maunz/Dürig, Kommentar zum Grundgesetz, Art 37, Rndz 31; Compare also II.2.

<sup>208</sup>Zuleeg, Die Stellung der Länder und Regionen im europäischen Integrationsprozeß, DVBl 1992, 1332 stressed the *temporary character* of the *substitutive legislative competence* of the *Bund* ex Article 37 GG and, in addition, argued that such a scenario would be quite unlikely.; In this sense also Gubelt: "(...) that the (legislative) measures are to be repealed as soon the *Land* will fulfil its duties." - Gubelt in: von Münch, Grundgesetz Kommentar<sup>2</sup> Bd 2, Art 37, Rndz 15; For Riegel the basis for the *substitutive legislative competence* is to be found in Article 24 GG, which would have *permanent character*. - Riegel, Überlegungen zum Problem EG-Richtlinien und nationale Rahmenkompetenz, EuR 1976, 86f; Riegel, Gliedstaatkompetenzen im Bundesstaat und Europäisches Gemeinschaftsrecht, DVBl 1979, 250.

<sup>209</sup>Thürer/Weber, Zur Durchführung von Europäischem Gemeinschaftsrecht durch die Gliedstaaten eines Bundesstaates, Schweizerisches Zentralblatt für Staats- und Verwaltungsrecht 1991, 461ff.



ECJ was the development of the doctrine of *direct effect*<sup>210</sup> of directives. In a way this represents a substitutive action in that the directive substitutes its (lacking) transposing act. The merits and the limits of this approach are well known. Another (complementary) instrument of improving compliance is, of course, *Francovich* and thus the financial liability of public bodies for non-implementation of directives. Soon after the *Francovich* judgement Article 171 of the EC Treaty introduced the the imposition of a penalty payment and a lump sum in order to stop the worrying growing number of proceedings for non-observance of a previous judgement of the Court<sup>211</sup>. Last but not least the procedure under Article 169 EC Treaty, with its administrative and judicial phase, has to be taken into consideration. Yet 'the Court has a range of weapons available against inadequate implementation of directives, all of which involve national tribunals and private individuals, rather than just the Commission, in the struggle against reluctant Member States'<sup>212</sup>.

It has become obvious that a *substitutive power* of a Member States' central institution vis-à-vis constitutionally autonomous sub-national units is not part of this broad arsenal of weapons. It must necessarily be superfluous in such a framework. *Zuleeg*, in fact, argued that 'given the present experiences an invoking of a substitutive power is quite unlikely'<sup>213</sup>. In more than thirty years of German membership of the Community the *substitutive power* of the *Bund* has had no practical relevance at all. Given the implementation record of the Austrian Länder in the framework of the EEA it is likely that in Austria too the *substitutive competence* is destined to remain unused. It might thus be considered a new but at the same time dead letter in the Federal Constitutional Law. This explains why Austrian Länder had no problem<sup>214</sup> with the enactment of Article 16, Section 6 B-VG (now Art 23d, Section 5 B-VG, BGBl 1913/1994). To conclude: substitutive powers within federal systems remain theoretically hypothetical and practically unused, if not useless. They are not an idoneous means of promoting compliance with European law at all.

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<sup>210</sup>One may add also \*refusing to give effect to national laws that conflict with directives and \*requiring national laws to be interpreted with reference and in the light of directives.

<sup>211</sup>See Commission, The Community Internal Market 1993 Report, COM (94) 55 final - Annex 3 (Court of Justice decisions not implemented by Member States infringement procedure initiated under Article 171 of the Treaty) that lists 21 such cases: Italy-6; Belgium-5; Germany-4; Greece-3; France-2, Luxembourg-1.

<sup>212</sup>*Anderson*, Inadequate Implementation of EEC Directives: A Roadblock on the Way to 1992?, Boston College International and Comparative Law Journal 1988, 111; In addition to the range of judicial weapons we should also remember the other efforts of the Commission in order to ensure effective implementation of Community rules: administrative cooperation and the interchange of data between administrations - COM (93) 69 final, the exchange of national officials (Karolus programme), improving the access of Union citizens to justice (e.g. the Green Paper on access to justice for consumers and the setting of consumer disputes in the single market - COM (93) 576 final), improving the transparency of Community rules - See: Commission, The Community Internal Market 1993 Report, COM (94) 55 final.

<sup>213</sup>*Zuleeg*, Die Stellung der Länder und Regionen im Europäischen Integrationsprozeß, DVBl 1992, 1333.

<sup>214</sup>Letter from HR Dr. *Gerhard Wielinger*, chief of the legal service of the Styrian government, to the author, March 1, 1994; The same is true for the German Länder.- Letter from G. *Matschiner*, chief of the state chancellery Saarland, to the author, June 30, 1994.



#### 4.4. Other cases for a substitutive competence

Having concluded that substitutive powers of Member States of the Community vis-à-vis their regions are neither sufficiently legitimised by the international responsibility and the state's competence in foreign policy nor idoneous in the framework of European Integration with its ever more sophisticated compliance-means, such a chapter must appear superfluous. However, it should again confirm that the European Community and states have no real necessity for a substitutive power vis-à-vis an independent institution.

Naturally such a (hypothetical) argumentation must depart from the premise that substitutive action can *per se* promote compliance with Community law. Another premise is certainly the fact that the institution against which a substitutive power is invoked must be independent. It would not make sense to exercise such a substitutive power against an institution that is subject to instructions, or in a field in which an institution that in general is independent must obey instructions, the non-compliance of which could be enforced via constitutional courts<sup>215</sup>.

In Italy a substitutive competence of the government is foreseen vis-à-vis public entities. Article 12 of legge n.86/1989 (*legge La Pergola*) states:

1. Se l' inadempimento di uno degli obblighi previsti dall' articolo 1, comma 1 [gli obblighi derivanti dall' appartenenza dell' Italia alle Comunità europee], dipende da inattività di un ente pubblico diverso dallo Stato, da una regione o da una provincia autonoma, il Presidente del Consiglio dei Ministri, su proposta del Ministro per il coordinamento delle politiche comunitarie, di concerto con i Ministri competenti per materia ed aquste le osservazioni dell' ente interessato, emana le direttive necessarie, assegnando all' ente medesimo un termine per provvedere.

2. Perdurando L'inattività oltre il termine predetto, il Presidente del Consiglio dei Ministri conferisce ad un commissario i poteri per provvedere in sostituzione degli organi dell' ente.

The fact that the Italian government has a right to issue directives as well as to act in substitution of the public agency, seems quite puzzling in the light of the above reasoning. As in the case of regions<sup>216</sup> the state possesses overwhelming powers to bring its interests to the fore. The substitutive power must in practice be superfluous, given the other possibilities of interference the state has. It is also intriguing that the substitutive power vis-à-vis Italian public agencies is enshrined in the article following that which embodies this competence vis-à-vis the regions. Thereby the regions, whose autonomy is enshrined in the Italian

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<sup>215</sup>This is, for example, true in Austria as regards the field of the so-called indirect federal administration (*mittelbare Bundesverwaltung*), where the Land governor (*Landeshauptmann*), is obliged to follow the instructions of the federal government as well as those of its single ministers. Compare Article 103, Section 1 and Article 20, Section 1 B-VG. In the case of non-compliance the Federal Government (*Bundesregierung*) can bring the Land governor before the Constitutional Court (*Verfassungsgerichtshof*) according to Article 142, Section 2, lit e B-VG. In its decision the Constitutional Court can order a dismissal from office, (adding in severe cases eventually) a loss of political rights as well as only state that there has been an infringement of the law (Article 142, Section 4 B-VG). Such an impeachment has only taken place once since 1945: In VfSlg 10.510/1985 "Fall Haslauer" the Constitutional Court stated that the non-compliance with the instruction of the minister for social affairs on part of the Land governor of Salzburg was a breach of the law (the case concerned the opening of shops on Lady Day, December 8, 1984).

<sup>216</sup>See Chapter II 2.3.



Constitution of 1948, are treated in the same way as [dependent] public agencies. This is at least significant for the status of the Italian regions. Let us now focus on other - more general - concepts of substitutive powers vis-à-vis institutions that are independent.

First we will examine courts, which are also bound to comply with and to apply European law. To invoke a substitutive power against a judgement of a court, especially a highest or constitutional court, seems heretical. This feeling of 'heresy' is because of the long tradition of judicial independence, dating back to *Montesquieu*<sup>217</sup>. Can it, nevertheless, be excluded that judgements of national courts may be in contrast with Community rules? Courts, especially constitutional Courts, are, in general, very cautious in their reasoning. In a controversial judgement a court might emphasise that it is only acting "in cooperation with the ECJ"<sup>218</sup>. In addition, the danger of a 'non-decision' is very slight, although the duration of some procedures acquires the quality of a 'non-decision'. For example, the average duration of a case at the European Court of Human Rights is 5 years and 6 month<sup>219</sup>; another prominent example is the Italian courts<sup>220</sup>. Thus the same argumentation as for sub-national entities could be applied. Here, the state's openness towards European Integration would prevail over the principle of separation of powers, and not over the federal principle. European Integration or international responsibility would, in any case, be stronger than the vertical as well as the horizontal separation of powers.

In Austria, Article 6, Section 1 of the ECHR<sup>221</sup> finally led to the introduction<sup>222</sup> of independent administrative tribunals within the *Länder* (*Unabhängige Verwaltungssenate in den Ländern*) that are competent to decide about civil rights and obligations in individual cases. Thus a broad range of former powers of *Länder* authorities have shifted to an independent tribunal. Should substitutive action be admissible vis-à-vis such courts that decide about individual administrative cases in the field of *Länder* competences (in last ordinary instance)? Or should substitutive action be limited to general norms? If the international responsibility of the state is considered more important than the vertical and the horizontal division of powers, the answer would clearly be in favour of a substitutive competence also in individual cases

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<sup>217</sup>To see that the vertical division of powers also has a long tradition in Europe, we only have to think of the Holy Empire before the era of absolutism began in the 17. century .

<sup>218</sup>BVerfG Urteil des Zweiten Senats vom 12.10.1993 - 2 BvR 2134792, 2 BvR 2159/92 -, translation in International Legal Materials 1994, 396.

<sup>219</sup>The number concerns the 80 judgements of 1992, the average duration for the first 6 judgements of 1993 was 6 years and 2 month. - Peukert, Vorschläge zur Reform des Europäischen Menschenrechtsschutzsystems, EuGRZ 1993, 183. This raises the question of whether even the European Court of Human Rights itself violates Article 6(1) of the ECHR (the right to a public hearing within a reasonable time).

<sup>220</sup>Out of the 59 cases of the ECHR regarding the duration of the procedure (till 31.12.1991) Italian courts were concerned in 40 cases. - Peukert, Vorschläge zur Reform des Europäischen Menschenrechtsschutzsystems, EuGRZ 1993, 175 FN 28.

<sup>221</sup>Article 6(1) ECHR: In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. (...).

<sup>222</sup>B-VGN 1988 BGBl 685 - See: Article 129, 129a, 129b B-VG; The so-called UVS (*Unabhängige Verwaltungssenate*) were constituted on January 1, 1991. Compare: *Pernthaler, Unabhängige Verwaltungssenate und Verwaltungsgerichtsbarkeit*, Wien: Braumüller, 1993.





vis-à-vis courts. These short reflections demonstrate that the concept of substitutive powers as such is the result of a weighing up of values and principles, the outcome of which cannot be conclusive.

A second case where the concept of substitutive powers is applied are independent agencies. Such independent boards have no tradition in the Member States of the Community<sup>223</sup> that can be compared with that of courts or sub-national units. In Sweden, where central agencies (*verken*) have a longer tradition<sup>224</sup>, a restructuring of the Swedish central administration is taking place<sup>225</sup>. At this time the boards are all responsible to the government, which issues general instructions to direct their activities. The boards act on the basis of residual powers in the sense that the government has a general right and obligation to run the country. In most cases the boards are only truly independent where they have to render an individual decision, because no public body or minister may intervene and decide in the individual case. They are thus mainly concerned with technical matters and subject to general instructions<sup>226</sup>. The same is true for Norway, where the government retains, in principle, the powers to give instructions to all subordinate state bodies, including various directorates (the equivalent of the Swedish *verk*)<sup>227</sup>. As said above, substitutive powers are by definition senseless vis-à-vis institutions that are subject to instructions.

Therefore, we should, for example, look at national central banks (especially the German *Bundesbank*<sup>228</sup>) and standardisation-institutes that exercise autonomous administrative and legislative<sup>229</sup> functions. There are good - not only technical - reasons for

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<sup>223</sup>In the United States independent government agencies date back to the end of the 19th century (e.g. the Interstate Commerce Commission in 1887). For the vast number of American agencies, see: *Whitnah* (Ed.), *Government Agencies - The Greenwood Encyclopedia of American Institutions*, Westport: Greenwood Press, 1983; Only recently has there been some proliferation of more or less independent agencies in Member States of the Community, e.g.: France: *autorités administratives indépendantes*, Great Britain: regulatory offices; For the experience of American regulatory agencies, the independence of which is limited mainly by the capacity of Congress to amend the respective agency's statute and by budgetary appropriations, and for the European Community see: *Dehousse* ed al, *Europe after 1992 - New Regulatory Strategies*, EUI Working Paper LAW No.92/31.

<sup>224</sup>*Strömholm*, *An Introduction to Swedish Law*, Second Edition 1988, 85; *Wise/Amna/Sinclair*, *National Administrative Agencies in Transition: A Comparison of Sweden and the United States*, *International Journal of Public Administration* 1994, 1825-1851.

<sup>225</sup>Letter from Prof.*Strömholm*, President of Uppsala University, to the author, June 22, 1994.

<sup>226</sup>Letter from Doc.*Lysen*, Uppsala University, to the author, August 13, 1994.

<sup>227</sup>Letter from Prof.*Backer*, Department of public and international law - University of Oslo, to the author, July 4, 1994.

<sup>228</sup>For the independence of the *Bundesbank* - Article 12 *Gesetz über die Deutsche Bundesbank* idF vom 22.10.1992, BGBl I, 1782: (...) *In exercising the powers conferred on it by this act, it is independent of instructions from the federal government.*; For the necessity that also the ECB is independent - Article 88 GG: (...) *In the framework of European Integration their rights can be transferred to the ECB, which is independent and has the primary task of assuring price stability.*

<sup>229</sup>This in as far as they have the power to issue regulations. In theory, norms of the Austrian standardization institute (*Österreichisches Normungsinstitut*) enter into force only by virtue of law of parliament or a regulation or directive based upon such a bill. In practice, however, these acts only refer to the norms of the standardization institute. Such a dynamic referral (*dynamische Verweisung*) is not admissible in the light of the constitution, because it constitutes a delegation of the power to legislate. However, in this case the aspect of expertise has become so important as to 'override' this principle.



their independence<sup>230</sup>. The independence of national banks will not change in the course of European Integration. Article 107 EC Treaty expressly states that the ECB, national central banks and of members of their decision making bodies are independent with regard to Community institutions, governments of Member States and any other body. This leads to the question of whether a substitutive power vis-à-vis such an institution could be compatible with an independence that is guaranteed even on the level of primary Community law. Here preferences have been set up in favour of an independent agency, ruling out anything like a substitutive power vis-à-vis this kind of institution.

A third hypothetical case for substitutive competences could be states themselves. If European Integration is to be at the fore and substitutive powers are an idoneous means to promote compliance with European law, why should there not be a substitutive power of either sub-national units or the Commission vis-a-vis the State (the *Bund*)? A substitutive competence of the former would theoretically be possible if we consider the relationship of *Länder* and *Bund* one of parity. Every use of such a competence has, however, to take the principle of federal comity into account. What implications does this principle have in this case? It is - as we will see in the Chapter II. 1. - the basis for a substitutive power of the *Bund* vis-à-vis the *Länder*. Should it have the opposite effect here? Its vagueness, particularly in context with the principle of openness towards European Integration, limits its judicial importance noticeably. A reference to this principle in a procedure before the *Bundesverfassungsgericht* (according to Article 93, Section 1, Number 3 GG) in order to invalidate the substitutive act taken vis-à-vis the *Bund* would confront the German Constitutional Court with a very difficult weighing up of principles. It might be hard to give reasons for a different outcome as in the case of the invoking of a substitutive power vis-à-vis a *Land*.

However, any invoking of a substitutive power against a body that not only has de jure the quality of a state (such as the *Bund* or a *Land*) but that de facto is to be understood as an indispensable partner in the process of problem-solving must necessarily involve serious political difficulties. A substitutive action, especially when of permanent character, would easily be interpreted a strong act of interference. 'Symbolic questions' play an important role in federal systems<sup>231</sup>, hence substitutive powers as such will probably be perceived as a sort of 'unfriendly act'. In federal systems, which are - like the German and the Austrian systems - shaped by cooperative patterns and an interlocking of policies and politics between the different levels of government<sup>232</sup>, it seems unlikely<sup>233</sup>, if not even impossible, to use such a

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<sup>230</sup>It has, in addition, often been argued that the greatest support for the Bundesbank's independence comes not from the statute book (FN 196), but that its independence ultimately rests on societal support and the competence of the men in charge. - Marsh, *The Bundesbank - The Bank that rules Europe*, 25; Goodman, *Monetary Sovereignty - The Politics of Central Banking in Western Europe*, 59.

<sup>231</sup>It has become quasi a 'compulsory exercise' for politicians both of the federal and state level to emphasise in official speeches the positive effects of federalism. This has led to the characterisation that the German federalism would be 'protected mainly literally'. - Lhotta, *Der verkorkste Bundesstaat*, ZParl 1993, 129.

<sup>232</sup>Scharpf/Reissert/Schnabel, *Politikverflechtung: Theorie und Empirie des kooperativen Föderalismus in der Bundesrepublik*, Kronenberg: Scriptor, 1976.

<sup>233</sup>In this sense also Zuleeg, *Die Stellung der Länder und Regionen im europäischen Integrationsprozeß*, DVBl 1992, 1333.



'heavy means' vis-à-vis the other actor or rather partner. Under such conditions and circumstances the debate about substitutive powers vis-à-vis *Länder* must at first be of a theoretical value. However, it again reveals that the coincidence of European law with a multilevel legal structure is conceptualised mainly in traditional patterns of constitutional law, which must necessarily remain inadequate. In practice, though, the conclusion of *Benz* seems to be affirmed:

The theory of federalism should take into account the fact that the problem-solving capacity of states is to a considerable extent dependent on their ability to adapt and to change their structures and to react to changed conditions. Therefore regionalisation and decentralisation should not only be discussed in normative perspective but also taken as indicators of processes of necessary adaptation and self-transformation of the intergovernmental system in the welfare state.<sup>234</sup>

In a system that is characterised by subordination of the sub-national entities and patterns of confrontation the situation must be different. In such a structure the state will have other and stronger means available to ensure its dominance. In this framework a substitutive competence will be of secondary importance because hierarchical instruments are invoked. For example, the *competenza d'indirizzo e coordinamento*. The Italian case also shows the resistance of a hierarchical and monistic power structure to change, i.e. to 'regionalise'.

For different reasons substitutive competences remain unused. In the respective constitutional and politico-administrative context they are either perceived as for being too strong or too weak. Thus they are no instrument of which states make *de facto* use of. Notwithstanding the *practical improbability* of their usage and the notion that substitutive powers have not proven to be an *idoneous remedy* to improve compliance with European law, they are provided for in several legal systems. As the case study will further show substitutive powers reveal a certain neglect for the value of decentralisation in the process of weighting up of different values.

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<sup>234</sup>*Benz*, Regionalization and Decentralization, in: *Bakvis/Chandler*, Federalism and the Role of the State, 144.



## II. Cases of Substitutive Powers

### 1. The Federal Republic of Germany: The unwritten constitutional principle of *federal comity* at the centre

#### 1.1. Is the European Community '*Landesblind*'?

It is not the intention of this chapter to deal with the genesis and the development of German federalism. It is well-known that since the entering into force of the *Grundgesetz* in 1949 there has been a trend towards centralisation, as noted in *Konrad Hesse's* classic work '*Der unitarische Bundesstaat*', published in 1962.

Structures, especially federal structures, are never static<sup>235</sup>. The centralising tendency, which has taken place particularly in the field of the concurring legislation (Article 72 GG) and by the extension of competences of the Bund under Article 74 GG<sup>236</sup>, is, however, primarily counterbalanced by the principle of *federal execution* or *administrative federalism*. According to Article 83 GG it is 'the *Länder* [that] shall execute federal laws as matters of their own concern in so far this Basic Law does not otherwise provide or permit'. This Article also plays an important role in the implementation of Community law: Article 83 GG has been used in an analogous way by the German *state-practice* although the supranational law [of the EC] is neither a law of the Bund nor of a Land. According to *Stern* 'this was inevitable because other solutions would not fit into the constitutional order'<sup>237</sup>. Another counterpoint to the centralisation trend is undoubtedly the *Bundesrat*. As regards the European Integration we have to take the new Article 23 GG into consideration; this article constitutes a 'massive

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<sup>235</sup>Hrbek, The political dynamics of regionalism: FRG, Austria, Switzerland, in: *Morgan* (Ed.), *Regionalism in European Politics*, 30; Compare also: *Benz*, *Föderalismus als dynamisches System*, Opladen: 1985.

<sup>236</sup>It should be remarked that within the ongoing reform of the Basic Law the '*necessity-clause*' for the exercise of the concurring legislation by the Bund will be put into more concrete terms and its use thereby restricted. Compare: *Sannwald*, Die Reform der Gesetzgebungskompetenzen nach den Beschlüssen der Gemeinsamen Verfassungskommission von Bundestag und Bundesrat, DÖV 1994, 629-637; However, debates about '*re-federalisation*' have traditionally focused too much on the institutional-constitutional level, neglecting the dimension of constitutional reality (i.e. the interlocking of the different levels, the highly consensual politics in the framework of German federalism). See: *Lhotta*, Der "verkorkste Bundesstaat" - Anmerkungen zur bundesstaatlichen Reformdiskussion, ZParl 1993, 117-132; The limited outcome of the ultimate '*federal-state reform*' confirms the assumption of *Benz*: "Although founded on a new paradigm of decentralisation, most of these tendencies toward decentralisation and regionalisation remain informal processes, which change only the mode of interaction. [...] no structural changes of bureaucratic administration and only unimportant reductions of centralist regulation have followed as yet." - *Benz*, Regionalization and Decentralization, in: *Bakvis/Chandler* (Ed.), *Federalism and the Role of the State*, 140f.

<sup>237</sup>*Stern*, Das Staatsrecht der BRD, Bd II, 785; For the constitutional background for the implementation of European law in Austria see II.3.3.





improvement of the legal position of the *Länder* in the participation at the decision-making process in matters of the European Union<sup>238</sup> via the *Bundesrat*.

In addition to this institutional framework, the interlocking of policies and politics between the different levels of government (the Bund and the Land), the so-called *cooperative federalism*<sup>239</sup> and some effects of *Politikverflechtung*<sup>240</sup> should be borne in mind. Yet inter-governmental relations are undoubtedly the crucial mechanism in the German federal system, so that political science<sup>241</sup> in this field has largely focused on their development. For the purpose of this chapter I shall restrict myself here to a few remarks regarding one outstanding effect *cooperative federalism* has for our case: that the close interdependence of the participating units, combined with the high need for consensus in such a system, must necessarily replace traditional tools of administration such as the issuing of instructions and supervision. For *Ernst-Hasso Ritter* 'the principle cooperation is the correlate of of decentralised carrying out of tasks'<sup>242</sup>. 'Bargaining and compromise are the dominant patterns of political behaviour in this system, since the different levels and actors are linked with each other in various respects and are interdependent.'<sup>243</sup> *Lehmbruch*<sup>244</sup> has, in addition, pointed out that the remarkable strength of this patterns of inter-governmental bargaining and accomodation is by no means a recent phenomenon but has its roots in a tradition that dates back almost to the era of *Bismarck*. An invoking of a substitutive power obviously does not fit into these patterns. That, in practice, the use of a substitutive power is not only improbable<sup>245</sup> but *de facto* impossible - given the role of the *Bundesrat* in the procedure of invoking the substitutive power - should always be borne in mind when writing about the theoric framework of this competence. Also 'federal

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<sup>238</sup>*Herdegen*, Die Belastbarkeit des Verfassungsgefüges auf dem Weg zur Europäischen Union, EuGRZ 1992, 593; For critique at this new 'Europe-Article' see only: *Oppermann/Classen*, Die EG vor der Europäischen Union, NJW 1993, 11f; *Classen*, Maastricht und die Verfassung: kritische Bemerkungen zum neuen "Europa-Artikel" 23 GG, ZRP 1993, 57ff.

<sup>239</sup>Cooperative phenomena are at first phenomena within the executive branch. Their role in the framework of the judiciary and the legislature is undoubtedly much smaller. Yet we face a multitude of cooperative forms. For a categorisation of cooperative phenomena in federal systems see: *Bothe*, Die Kompetenzstruktur des modernen Bundesstaates in rechtsvergleichender Sicht, 282f; Compare also: *Pietzcker*, Landesbericht Bundesrepublik Deutschland, in: *Starck* (Hrsg.), Zusammenarbeit der Gliedstaaten im Bundesstaat, 17-76.

<sup>240</sup>*Scharpf/Reissert/Schnabel*, Politikverflechtung: Theorie und Empirie des kooperativen Föderalismus in der Bundesrepublik, Kronenberg: Scriptor, 1976.

<sup>241</sup>The debate started with the study of *Scharpf et al*, see previous footnote; recently see: *Scharpf*, Optionen des Föderalismus in Deutschland und Europa, Frankfurt: Campus, 1994.

<sup>242</sup>*Ritter*, Zentrale Steuerung bei dezentraler Aufgabenwahrnehmung, in: *Scharpf/Reissert/Schnabel* (Hrsg.), Politikverflechtung II, 1977, 151.

<sup>243</sup>*Hrbek*, The political dynamics of regionalism: FRG, Austria, Switzerland, in: *Morgan* (Ed.), Regionalism in European Politics, 41.

<sup>244</sup>*Lehmbruch*, The Länder in German Federalism, paper presented at the European Forum Conference 'Regionalization in Europe: Evaluation and Perspectives', EU: June 2-3, 1994.

<sup>245</sup>So *Zuleeg*, Die Stellung der Länder und Regionen im europäischen Integrationsprozeß, DVBl 1992, 1333.

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enforcement' in general as foreseen in Article 37 GG has never been taken into consideration till now.

At the centre of the analysis in this chapter is the unwritten constitutional principle of *federal comity* or *loyalty*. This paper does not claim to represent a thorough and exhaustive analysis of this principle<sup>246</sup>, but mainly has the purpose of gaining deeper understanding of the legal implications of this principle in the 'tripolar European relationship, [the] magical triangle of Community, Bund and Länder'<sup>247</sup>. The following paragraphs also give an idea of an hard attempt on the part of German doctrine to legitimise a power, that will never be used. Certainly, it lies in the very nature of an emergency competence or *ultima ratio* power that it can and will only be invoked in those particular circumstances for which it was created: here, however, it seems almost to be a case of real *dead law*. One might not only come to the conclusion that constitutional doctrine has neglected the realities of German federalism, that is to say the preponderance of cooperative patterns, but that their argumentation demonstrates difficulties in the conceptualising of the impact of European integration on the nation state as well as of federalism as such<sup>248</sup>.

Reflections on the implications of European Integration on the federal structure of Germany often take as their starting point the famous statement of *Hans Peter Ipsen*, who described the EC as "being inevitably *Landes-blind*"<sup>249</sup>. He was absolutely right when, in 1966, he lamented that the EC Treaty, in speaking generally of Member States and in using the term *Länder* only for non-Member States and not for sub-national units (such as for the *Länder* of the Federal Republic of Germany), it would ignore *Länder* as representatives of sovereign rights of their own.

Since the Maastricht Treaty the situation has changed slightly: under Article 198a<sup>250</sup> ECT the *Committee of the Regions* was established. Some authors are, it seems to me, over-optimistic in their evaluation of the Committee<sup>251</sup>, which has only advisory status and whose members are, in addition, not subject to directives. The development of the Committee may be

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<sup>246</sup>For such an analysis, see: *Bayer*, *Die Bundestreue*, Tübingen: 1961; An overview on the principle of *federal comity* in english is to be found in: *Blair*, *Federalism and Judicial Review in West Germany*, Oxford: Clarendon Press, 1981, 146-206.

<sup>247</sup>*Christiansen*, *The Länder between Bonn and Brussels: The Dilemma of German Federalism in the 1990s*, *German politics*, Vol.1, No.2 (August 1992), 240.

<sup>248</sup>See particularly *Birke*, *Die deutschen Bundesländer in den Europäischen Gemeinschaften*, 64.

<sup>249</sup>*Ipsen*, *Als Bundesstaat in der Gemeinschaft*, in: *Caemmerer/Schlochauer/Steindorff*, *FS Hallstein*, 257; See also: *Birke*, *Die deutschen Bundesländer in den europäischen Gemeinschaften*, 128: The organs of the Community not have to take the federal structure of Germany into consideration.; For today's validity of *Ipsen's* statement see e.g.: *Schweitzer*, *Europäische Union: Gefahr oder Chance für den Föderalismus in Deutschland, Österreich und der Schweiz - Thesen*, *EuR* 1993, 329.

<sup>250</sup>A Committee consisting of representatives of regional and local bodies, hereinafter referred to as 'the Committee of the Regions', is hereby established with advisory status.

<sup>251</sup>See, for example: *Schink*, *Die europäische Regionalisierung*, *DÖV* 1992, 385; Compared with the inner-state-participation-procedure the Committee will for the time being be second important for the German Länder. - *Kalbfleisch-Kottsieper*, *Fortentwicklung des Föderalismus in Europa*, *DÖV* 1993, 549.



uncertain<sup>252</sup>, it might 'for the time being remain only second important for the German Länder compared with the inner-state participation procedure'<sup>253</sup>. However, it can be perceived as an important step forward and as an acknowledgement of the role of regions for European integration. In addition, the alteration of Article 146 EC Treaty<sup>254</sup> legitimised that a representative of the Länder was sent to the European Council. According to Article 23, Section 6 GG<sup>255</sup> the exercise of the rights as Member State of the Union ought to be conferred upon a Länder representative to be nominated by the Federal Council, if exclusive legislative competences are 'principally' concerned. The exercise of this rights should, though, safeguard the 'responsibility of the state as a whole'.

This provision has been harshly criticized. It has been said that Article 23, Section 6 GG introduces 'a mixed-administration as regards foreign affairs, damaging thereby the unity of the federal state outwardly'<sup>256</sup>. This statement reflects a traditional position in favour of a *Bund's* monopoly over external relations. It is, however, not least European Integration that has 'called the dichotomy between internal and external affairs, and [thus] the monopoly of the national governments over the latter in question'<sup>257</sup>. Another much criticised aspect is the participation of and the coordination with the Federal Government<sup>258</sup>. The responsibility of for the whole state, emphasised in the last sentence of the provision implicates that here the principle of federal comity<sup>259</sup> towards the Bund has to be at the fore. This 'guiding principle' for the conduct of the Land representative in the Council seems, in any case, not

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<sup>252</sup>The opinion of *Tomuschat* that such a *Länderkammer* would be in the way, seems too harsh to me. - *Tomuschat*, *Bundes- und Integrationsgewalt des Grundgesetzes*, in: *Magiera/Merten*, *Bundesländer und Europäische Gemeinschaft*, 43; For an assessment of the Committee see particularly the reports of *Thomas Christiansen* and *Gary Marks* at the workshop on the Committee of the Regions, EUI Florence, January 13, 1995 (forthcoming as EUI Working Paper).

<sup>253</sup>*Kalbfleisch-Kottsieper*, *Fortentwicklung des Föderalismus in Europa*, DÖV 1993, 549.

<sup>254</sup>The Council shall consist of a representative of each Member State at ministerial level, authorized to commit the government of that Member State.

<sup>255</sup>Introduced by German Constitutional Law December 21, 1992 - dt BGBl 1992 I, 2086.

<sup>256</sup>*Herdegen*, *Die Belastbarkeit des Verfassungsgefüges auf dem Weg zur Europäischen Union*, EuGRZ 1992, 593.

<sup>257</sup>*Dehousse*, *Regional Autonomy and European Integration: The Lessons of Maastricht*, paper prepared for the European University Institute, Florence, 1993; Compare also I. 4.2.

<sup>258</sup>For *Randzelhofer* the provision is 'a very dark one'. - *Randzelhofer* in *Maunz/Dührig*, *Kommentar zum Grundgesetz*, Art 24 I Rdnr 209.

<sup>259</sup>Maybe the principle of *Community comity* (Article 5 EC Treaty) is even more important in this case. In this sense *Birke*, *Die deutschen Bundesländer in den Europäischen Gemeinschaften*, 129; *Bleckmann* proposed a new interpretation of Article 31, 109 GG and the principle of federal comity in order to bind the Länder to the 'goals' of the Bund's politics. His argumentation not only follows the model of the 'unitarian federal state' (*Konrad Hesse*) but represents a unilateral understanding of the principle of federal comity. In the understanding of doctrine and Constitutional Court, however, the principle of federal comity is not only mutual (BVerfGE 13, 75) but also a principle that should lead to coordination and not to the subordination to the political goals of one of the two entities. See: *Bleckmann*, *Zur Bindung der Länder an die Ziele der Bundesrepublik*, DÖV 1986, 125ff.



'justiciable'<sup>260</sup>. It is neither foreseen in Article 23 GG that the Constitutional Court might decide about (mis)conduct of the Länder-representative in the European Council nor does it fall under Article 93 GG<sup>261</sup>. It is also uncertain how it could otherwise be enforced. The representative lacks accountability vis-à-vis the Bundestag<sup>262</sup> as well as vis-à-vis the Bundesrat. He can be made politically accountable only by his respective Land parliament. For Herdegen 'this construct is the proof of Kelsen's theory of the impossibility of a Federal State within another Federal State'<sup>263</sup>. In spite of these unfavourable judgements it seems that the participation of a Land representative in the European Council is another element in the field of cooperative federalism on the German as well as on the European level.

In the light of these, albeit modest, changes, Ipsen's statement of 1966 must be reevaluated. In addition to the improvements for the regions by the Maastricht treaty we should also take the changes on the domestic level (Article 23 GG and the *Law about the Cooperation of Bund and Länder in Matters of European Integration*<sup>264</sup>) into consideration. One might also add that Germany is no longer the only state with a federal-structure within the Community<sup>265</sup> (as it was in 1966). Although the position of regions in general in the European Community remains weak and that it had been not erroneously argued that regions 'continue to be objects rather than participants in the decision-making process'<sup>266</sup>, yet the Community is no longer fully *Landesblind*. Whether the Community will open its eyes fully to

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<sup>260</sup>In the 1994 amendment of the Austrian Constitution (BGBl 1013/1994) a similar participation of a representative of the Länder was foreseen (in case legislative competences of the Länder are concerned): Art 23d, Section 3 B-VG. In addition the possibility to impeach the Austrian representative in the council was added by Article 142, Section 2, letter c B-VG. Compare Appendix III.

<sup>261</sup>Without going into too much detail it can be said that the Bundesverfassungsgericht is certainly not empowered to annul acts taken by the representative of the Länder in the Council. There are, for example, intermediate measures when a conduct not in line with the general interest of the whole state is foreseeable. This intermediate measure could - given that the representative of the Länder is not subject to instructions - in fact only consist in the decision that instead of the Länderminister a minister of the federation must participate in the Council. This, however, seems quite unlikely. It is also not possible to make the representative legally responsible after he has, for example, voted in the Council. An accusation of a representative of a Land, as foreseen in the Austrian Constitution, does not exist in Germany. Compare FN 260.

<sup>262</sup>For further critique of the lack of accountability of the representative of the Länder, see: Badura, *Der Bundesstaat Deutschland im Prozeß der europäischen Union*, 22.

<sup>263</sup>Herdegen, *Die Belastbarkeit des Verfassungsgefüges auf dem Weg zur Europäischen Union*, EuGRZ 1992, 594.

<sup>264</sup>Article 7 I obliges the Federal Government where legislative competences of the Länder are concerned to bring the matter before the ECJ. See *Gesetz über die Zusammenarbeit von Bund und Ländern in Angelegenheiten der Europäischen Union*, BGBl 1993 I, 313 (Appendix I).

<sup>265</sup>Compare I. 1.

<sup>266</sup>Christiansen, *The Länder between Bonn and Brussels: The Dilemma of German Federalism in the 1990s*, German Politics, Vol.1, No.2 (August 1992), 260.

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the regions and endow them with constitutional status within a three tiered federation remains an open question<sup>267</sup> for the time being.

However, *Landesblindheit* plays a certain role in the judgements of the ECJ. This is clearly connected with the fact that it is the Member States who are held to account before the Court for non-compliance with European law. Advocate General *van Gerven* has argued:

There is rightly no dispute between the parties that the internal constitutional arrangements of the Member States are not in principle directly influenced by Community law but that, on the other hand, those arrangements are not and cannot be a pretext for a lesser degree of compliance with Community obligations, including the obligations flowing from Article 5 of the Treaty.<sup>268</sup>

Here *Landesblindheit* means that the Court is not willing to accept the argument of an internal (vertical) division of competences as justification for non-compliance with European law. It also means that '(...) it is not for the Commission to rule on the division of competences by the institutional rules proper to each Member State, or on obligations which, in a State having a federal structure, may be imposed on the federal authorities and on the authorities of the federated States respectively'<sup>269</sup>. This does not, however, mean that the ECJ today is ignoring sub-national units and their importance<sup>270</sup> for the transposition and implementation of Community law. In the above-quoted judgement (Case 8/88) concerning the carrying-out of suckler cow and sheep meat premiums [which according to the GG is to be done by German Länder] the Court decided that the Commission '(...) may only verify whether the supervisory and inspection procedure established according to the arrangements within the national legal system<sup>271</sup> are in their entirety sufficiently effective to enable the Community requirements to be correctly applied'. It is true that the ECJ does 'not rule on the division of competences by the institutional rules proper to each Member State', but this does not hinder the Court from examining and evaluating the efficiency of mechanisms and principles of federal systems for the carrying out of Community law. A recent case of such an evaluation is the Court's decision 237/90<sup>272</sup>. The German Federal Government had argued:

En ce qui concerne l' obligation de notification au gouvernement fédéral de part des autorités des Länder, elle n' est pas imposée par la directive et serait, en tout état de cause, inutile dans la mesure où elle résulte déjà du principe de la loyauté envers le Bund (Grundsatz des bundesfreundlichen Verhaltens).

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<sup>267</sup>(...) the question of allocation of responsibilities and competences between European, national and regional level will continue to dominate the institutional discussion.' - *Schäfer*, Die institutionelle Weiterentwicklung der EG, DÖV 1991, 268.

<sup>268</sup>ECJ Case 8/88 "EAGGF" - Disallowance for expenditure" (FRG v Commission), ECR 1990, 2337.

<sup>269</sup>ECJ Case 8/88 "EAGGF" - Disallowance of expenditure" (FRG v Commission), ECR 1990, 2337.

<sup>270</sup>See Chapter I. 3.1.

<sup>271</sup>In this case the administrative directives in three Länder were mainly not sufficient in order to guarantee the proper observance of the substantive and formal conditions of the grant in question because of the lack of any form of organization for on-the-spot inspections and comprehensive administrative checks.

<sup>272</sup>ECJ Case 237/90 "Trinkwasserverordnung" (Commission v FRG), ECR 1992, 5973.

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The ECJ decided that:

(...) le principe de la loyauté envers le Bund ne suffit pas pour garantir aux gouvernement fédéral l'obtention, en temps utile, des informations relatives aux dérogations accordées par les Länder.

The ECJ stated that the Federal Government ought to have imposed an explicit notification duty on the *Länder* in the (federal) directive on water for human consumption (*Trinkwasserverordnung*) about the introduction of derogations permitted temporarily under Council Directive 80/778. The fact that for the ECJ the reference to the principle of federal comity was insufficient seems particularly important, because German doctrine is basing the substitutive power of the Bund vis-à-vis the *Länder* on exactly this principle. In the '*Wallonian Case*' Advocate General Mancini had argued that in the legal system of Belgium "there is no legislation conferring on the State the power to compel the regions to implement Community legislation or to substitute itself in order directly to implement legislation in the event of a persistant delay on their part"<sup>273</sup>. In Case 237/90 the ECJ now stated that even the reference to a general principle of national constitutional law such as federal comity would not be enough and that more concrete means (e.g. a duty and right of the Bund to monitor the *Länder*'s conduct) would be required.

## 1.2. The unwritten constitutional principle of *federal comity*

Regardless of some initial attempts by German doctrine to give the Bund general responsibility for the transposing<sup>274</sup> of Community law, this has, in fact, been given to the *Länder* according to Article 70 GG<sup>275</sup>.

It should be remembered that in the 1960s some authors<sup>276</sup>, following a traditional view in international law, argued that the Bund, which is competent for the conclusion of an international treaty "is (in such a case) obliged in international law to secure the corresponding

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<sup>273</sup>Opinion of Advocate General Mancini - ECJ Cases 227 to 230, ECR 1988 "Toxic Waste"(Commission v Belgium), 6f, Compare also Chapter I.3.2., p 22ff.

<sup>274</sup>It has been argued, for example, that the Bund could rely on Article 74, Number 11 (the law relating to economic matters). It has correctly been argued that the use of this provision as a general clause for the transposing of Community law would in fact render the competence catalogue (and especially Article 70) absurd. See: Grabitz, Die Rechtssetzungsbefugnis von Bund und Ländern bei der Durchführung von Gemeinschaftsrecht, AöR 1986, 17; Schwan, Die deutschen Bundesländer, 151.

<sup>275</sup>See Basic Law Article 70 (Legislation of the Federation and the *Länder*)

[1] The *Länder* shall have the right to legislate in so far as this Basic Law does not confer legislative power on the Federation.

[2] The division of competence between the Federation and the *Länder* shall be determined by the provisions of this Basic Law concerning exclusive and concurrent legislative powers.

<sup>276</sup>Glaesner, Deutscher Landesbericht, Droit Europeen III, Paris, 1965, 8; Birke, Die deutschen Bundesländer, 120 with references.

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constitutional means to be able to carry out all obligations assumed"<sup>277</sup>, and has therefore the *complete competence* to transpose Community law. However, the integration treaties are neither Concordats nor pre-constitutional treaties but treaties based on Article 24 German Basic Law<sup>278</sup> (or Article 23).

Some of the arguments from the 1960s are relevant to this paper because they are the pattern for the legitimation of a substitutive competence of the Bund. *Birke* placed the main emphasis on the so-called 'power of integration' attributed to the Bund by Article 24<sup>279</sup> and concluded:

"The only responsible partner of the founding Treaties and the only responsible participant in the realising of the aims of the Treaties is the Bund. Complete responsibility presupposes complete competence."<sup>280</sup>

As far as substitutive competences are concerned the argumentation would be: complete responsibility (of the state) necessitates a substitutive competence. In Italy the *Corte Costituzionale* stated in 1972 that every distribution of the power to implement Community rules in favour of sub-national entities differing from the contracting state (which is the only responsible for the observing and fulfilling of the obligations assumed vis-à-vis the Community) presupposes the possession on the part of the central state of appropriate means (in concreto: a substitutive competence) to assure their implementation<sup>281</sup>. At this time the nation-state is no longer 'the only responsible participant' in European matters. I have also argued in part I of this paper that the hypothesis of 'complete responsibility (of the Bund)' has been replaced by a much more complex system of responsibilities in the framework of

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<sup>277</sup>BVerfGE 6, 366 (309) "Konkordat"= Members of the Federal Constitutional Court, Decisions of the Bundesverfassungsgericht - International Law and Law of the European Communities 1952-1989, Volume 1/I, 135 (99).

<sup>278</sup>*Ipsen*, Als Bundesstaat in: *Caemmerer/Schlochauer/Steindorf*, FS Hallstein, 264f; For a differentiation from classic international law in this sense see also: *Randzelhofer* in *Maunz/Dürig*, Kommentar zum GG, Art 24 I, Rndz 30; In fact, the Concordat decision of the German Federal Constitutional Court cannot be applied to the transposition problem of EC-norms (especially directives): First, the BVerfG was concerned here with a duty arising from international law which has been handed down to the Bund (the Concordat had been concluded by the German Reich); second, the BVerfG stated that Concordates do not come under the provisions of Articles 32 and 59 GG, and therefore the competence to conclude Concordates follows domestic legislative competence (i.e. it is up to the Länder to conclude such treaties in the field of their exclusive legislative competences); third, the BVerfG argued that the Länder are in this case not bound to the observance of the concordat-provisions (ie schools provisions) by the principle of federal comity (and are constitutionally restricted in the denominational structure of schooling only by Article 7 GG). - BVerfGE 6, 361ff (309) = Decisions of the Federal Constitutional Court 1952-1989, Volume 1/I, 132ff (99); In this sense also *Riegel*, Gliedstaatskompetenzen im Bundesstaat und Europäisches Gemeinschaftsrecht, DVBl 1979, 247.

<sup>279</sup>This power would, according to *Birke*, not expire with the conclusion of the founding treaties but would renew itself with every act of implementation. Without going into the details of this debate I want to say that Article 24 (and now Article 23 I) only refers to the conclusion (and ratification) of a (European) integration treaty, which can - now according to Article 23, Section 1 GG - only be carried out parliamentary law (Bundestag with consent of the Bundesrat) and to a certain purpose (a united Europe...).

<sup>280</sup>*Birke*, Die deutschen Bundesländer, 78

<sup>281</sup>CC sentenza 24 luglio 1972 "Agriculture", Giur Cost 1972, 1451; Compare Chapter II. 2.1.



European integration. Hence the argumentation on which substitutive powers are based seems to be merely a continuation of an almost overcome reasoning.

Today there is no doubt<sup>282</sup> that in the field of their legislative competences the Länder are empowered to transpose Community and to implement Community law, according to Article 83 GG<sup>283</sup> (to be applied analogously<sup>284</sup>). Thus the position taken by Birke in the mid-sixties has had no effect as regards the implementation of Community law. With the incorporation of the new Article 23 into the Basic Law (and therein the 'constitutionalisation' of the participation procedure in European affairs), one might, in addition, argue that when the Länder even have the constitutional right of participation at the decision-making process on EC affairs, they have to have *a fortiori* the right - and also a certain interest<sup>285</sup> - to bring the result of that (albeit very complex) decision-making process into force.

There is no doubt that EC law as such is binding all (competent) state organs<sup>286</sup> and thus also the organs of *Länder*. There is no real need for additional domestic provisions that oblige state organs to fulfil the duties resulting from the integration treaties<sup>287</sup>. Nevertheless German doctrine has also brought forward another cause that would oblige Länder to implement

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<sup>282</sup>See, for example: *Stern*, Das Staatsrecht der BRD, Bd II, 784; *Vogel*, Die bundesstaatliche Ordnung des Grundgesetzes in: *Benda/Maihofer/Vogel*, Handbuch des Verfassungsrechts der BRD, 1074ff; *Schwan*, Die deutschen Bundesländer, 154 with references, 172; *Malanczuk*, European affairs and the Länder, CMLRev 1985, 263; *Magiera/Merten*, Bundesländer und Europäische Gemeinschaft, 186; *Grabitz*, Die deutschen Länder in der Gemeinschaft, EuR 1987, 311f; *Joos/Scheurle*, Bundesstaatliche Ordnung im Integrationsprozeß, EuR 1989, 228; *Kössinger*, Die Durchführung des Europäischen Gemeinschaftsrechts im Bundesstaat, 39ff, 46f; *Hailbronner*, Die deutschen Bundesländer in der EG, JZ 1990, 157; *Ehlers*, Die Einwirkungen des Rechts der Europäischen Gemeinschaften auf das Verwaltungsrecht, DVBl 1991, 610; *Zuleeg*, Die Stellung der Länder und Regionen im europäischen Integrationsprozeß, DVBl 1992, 1332; In the conclusion also *Riegel*, Gliedstaatskompetenzen im Bundesstaat und Europäisches Gemeinschaftsrecht, DVBl 1979, 250; *Korzinek*, Die Mitwirkung der deutschen Länder in Angelegenheiten der Europäischen Integration in: *Ginther/Isak/Posch*, Recht und Politik in einem größeren Europa, 161.

<sup>283</sup>See Basic Law Article 83 (Execution of federal laws by the Länder)

The Länder shall execute federal laws as matters of their own concern in so far as this Basic Law does not otherwise provide or permit.

Compare also: *Ipsen*, Europäisches Gemeinschaftsrecht, 220; *Malanczuk*, European affairs and the Länder, CML Rev 1985, 265; *Grabitz*, Die deutschen Länder in der Gemeinschaft, EuR 1987, 311f; *Joos/Scheurle*, Die bundesstaatliche Ordnung im Integrationsprozeß, EuR 1989, 228 FN 25; *Kössinger*, Die Durchführung des Europäischen Gemeinschaftsrechts im Bundesstaat, 46f, 58f; *Ehlers*, Die Einwirkungen des Rechts der Europäischen Gemeinschaft auf das Verwaltungsrecht, DVBl 1991, 610.

<sup>284</sup>Compare II. 1.1.

<sup>285</sup>In this sense also *Malanczuk*, who envisages the Länder-participation primarily functional to European integration: 'It is obvious that they (i.e. the Länder) are more prepared to loyally accept and implement European norms if they have been engaged in one way or another in their formulation.' - *Malanczuk*, European affairs and the Länder, CMLRev 1985, 271.

<sup>286</sup>Compare I. 3.2.

<sup>287</sup>Compare I. 3.3.

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European law correctly, namely the 'unwritten constitutional principle'<sup>288</sup> of federal comity. If this reference might be superfluous in practice, it has primarily another purpose: to serve as a legal basis for an eventual substitutive action of the Bund vis-à-vis the Länder. In a recent decision the ECJ held that the mere reference to the principle of federal comity by the Federal Government would be insufficient as a justification for non-compliance<sup>289</sup>. If this principle is not understood together with other basic choices and principles it must in effect be of a great vagueness<sup>290</sup> and can thus not assume more than the value of a programmatic principle and an, albeit unwritten, expression of cooperative federalism.

For Ipsen the principle of federal comity was too vague<sup>291</sup> to be a basis for an enforcement of Community law<sup>292</sup>. He argued that with the integration treaties the domestic division of competences has been "mutated". As a consequence the Länder ought to exercise their powers in a different, namely a communitarian, way. This obligation would arise from a 'communitarianisation' (*Vergemeinschaftung*) of the German state as a whole, the limbs of which are the Länder<sup>293</sup>. Ipsen was heavily reproached for "not verifying such a silent change of the Constitution"<sup>294</sup> as well as for "using a new - likewise unwritten - legal construction"<sup>295</sup>. In fact, the *Vergemeinschaftung* of the state seems to me to be in the end just the same as *European Integration as aim of the state (Staatsziel)*, that was finally enshrined in the new Article 23 GG.

A principle like the *federal comity* is typical of a federal state<sup>296</sup>. Even though its concrete meaning may vary from state to state its main task remains the same: coordination

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<sup>288</sup>The characterisation as an 'unwritten constitutional principle' for the federal comity (*ungeschriebenes Verfassungsprinzip*) was used first by Smend in 1916. - Smend, *Staatsrechtliche Abhandlungen und andere Aufsätze*, 32.

<sup>289</sup>ECJ Case 237/90 "Trinkwasserverordnung" (Commission v FRG), ECR 1992, 5973

<sup>290</sup>"It is in the nature of the principle of federal comity to be uncertain as regards content. (...) It can only be put in concrete forms by decisions of the Federal Constitutional Court." - Bayer, *Die Bundestreue*, 127.

<sup>291</sup>It is intriguing that in the so-called Concordate-decision of the Bundesverfassungsgericht the Länder took the position that "[...] an infringement of the principle of federal comity cannot be scrutinised in a judicial proceeding, because it would lack a clear legal definition." - BVerfGE 6, 328 (309) "Konkordat" - Compare FN 278.

<sup>292</sup>Ipsen, *Als Bundesstaat in der Gemeinschaft in: Caemmerer/Schlochauer/Steindorf, Festschrift Hallstein*, 264; "It is in the nature of the principle of federal comity to be uncertain as regards content. (...) It can only be put in concrete forms by decisions of the Federal Constitutional Court." - Bayer, *Die Bundestreue*, 127.

<sup>293</sup>Ipsen, *Als Bundesstaat in der Gemeinschaft in: Caemmerer/Schlochauer/Steindorf, Festschrift Hallstein*, 264.

<sup>294</sup>Schwan, *Die deutschen Bundesländer im Entscheidungssystem der Europäischen Gemeinschaften*, 162.

<sup>295</sup>Kössinger, *Die Durchführung des Europäischen Gemeinschaftsrechts im Bundesstaat*, 79.

<sup>296</sup>The German principle federal comity has undoubtedly had influence on the interpretation of Article 5 EC Treaty (compare also Article 86 ECSC, 192 EAEC). Member States and organs of the Community are thereby obliged to loyal cooperation and support. - Grabitz in: *Grabitz, Kommentar*, Art 5 Rdnr 17; Compare also ECJ case 2/88 "Zwartveld" (Request for judicial cooperation - Order of the Court), ECR 1990, 3366: "That principle not only requires the Member States to take all measures necessary to guarantee the application and effectiveness of Community law, if necessary by instituting criminal proceedings but also imposes on Member States and the Community institutions *mutual duties of sincere cooperation*."; See also: Hailbronner, *Die*

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between the different levels of government, understood as the contrary of subordination as well as of separatism<sup>297</sup>. One of its basic characteristics is therefore that it is mutual. The German *Bundesverfassungsgericht* stated in an early decision:

The Länder, just like the Federation, have the constitutional obligation to cooperate in accordance with the essence of the constitutional *alliance* that ties them together and to contribute to its strengthening and to the safeguarding of the well-understood interests of the Federation and its members (Glieder).<sup>298</sup>

The Austrian *Verfassungsgerichtshof* argued 'that the Bund and the Länder have to take the interests of the other sovereign authority into consideration whenever they exercise their own competences'<sup>299</sup>. It goes without saying that it depends on the situation which 'partner' of the constitutional *alliance* has to change or adapt his conduct<sup>300</sup> [understood in a broad sense] to make it compatible with the interest of the other. In different situations different interests will prevail. Every judgement based upon the principle of federal comity must therefore in the end be a weighing up of interests.

In Germany it was the Constitutional Court that had to put the principle of federal comity as '[a] constitutional norm intrinsic to the Basic Law that regulates the relationship between the Federation and the Länder, which can be properly understood only if looked at together with the other norms that regulate this relationship'<sup>301</sup> into concrete terms. This also indicates that the principle of federal comity per se cannot be more than a programmatic sentence.

In a leading decision of 1957 regarding the non-application of school-provisions of the concordat between the German Reich and the Holy Seat, the *Bundesverfassungsgericht* stated:

(...) in the Federal State nothing should happen that harms the whole or one of the members. Accordingly, federal comity requires the consideration of every member for situations of interests and tensions that arise in the Federation, in particular the outward-directed interests of the Federation. It must be concluded that particularly in the area of foreign relations, in

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deutschen Bundesländer in der Europäischen Gemeinschaft, JZ 1990, 152; For a survey of the principle of loyalty to the Community, see only: *Temple Lang*, Community Constitutional Law: Article 5 EEC Treaty, CMLRev 1990, 645.

<sup>297</sup>Maunz/Zippelius, Deutsches Staatsrecht<sup>25</sup>, 102.

<sup>298</sup>BVerfGE 6, 361f "Konkordat" = Decisions of the Federal Constitutional Court 1952-1989, Volume 1/I, 132f.

<sup>299</sup>VfGH 3.12.1984, G 81, 82/84, VfSlg 10292, VfSlg 8831; Strictly against any 'unilateral' character of the principle of federal comity: *Adamowich/Funk*, Österreichisches Verfassungsrecht<sup>3</sup>, 164; *Pernthaler*, Allgemeine Staatslehre und Verfassungslehre, 430f.

<sup>300</sup>The German Constitutional Court stated that it also concerns the 'procedere' and the style of negotiations. - BVerfGE 12, 255 (205) "Deutschland-Fernsehen".

<sup>301</sup>BVerfGE 6, 361 = Decisions of the Federal Constitutional Court 1952-1989, Volume 1/I, 132.



which the Federation has the presumption of competence in its favour, the Länder's duty of loyalty towards the Federation is to be taken particularly seriously."<sup>302</sup>

Having said this, the *Bundesverfassungsgericht* nevertheless concluded that the *Länder* are not obliged by the principle of federal comity to apply the school-provisions of the concordat because it is the *Länder* that are, according to Article 7 GG, competent for schooling, and this provision explicitly excludes other duties. In addition, the BVerfG stated that concordats do not come under the provisions of Articles 32 and 59 GG (foreign policy competence), and as a consequence of this the Bund cannot interfere in the Länder's exclusive power to conclude concordats in the field of their own legislative competences. The interest of the Bund did not prevail in this case. The concordat-case is not directly comparable with the implementation of Community law because of its special character. First, it dealt with a duty (arising of international law) that was only handed down to the Bund<sup>303</sup>; second, the conclusion of such concordats as well as their implementation are, according to the Basic Law, a competence of the Länder, so that, by definition, no tension should arise.

Nevertheless German doctrine has focused on the *Bundesverfassungsgericht's* statement that in foreign relations the loyalty-duties of the *Länder* towards the *Bund* are to be taken particularly seriously and has relied on this also in the context of European Integration. Taken together with the new Article 23 GG that proclaims a certain type of European Integration (namely one that respects the principle of democracy<sup>304</sup>, the rule of law, the social state, the federal structure and the principle of subsidiarity) as a state-goal, this would mean that the Länder are also bound by the principle of federal comity (and not 'only' by the EC Treaty) to exercise their legislative and executive power in a 'communitarian' way. The principle of federal comity does not change the competences of the Länder as such but limits the exercise of its powers<sup>305</sup>. In 1961 the BVerfG stated:

"The principle of federal comity, (...), constitutes or limits only rights and duties within an existing legal relation between Bund and Länder, but does not create an independent legal

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<sup>302</sup>BVerfGE 6, 361f "Konkordat"= Decisions of the Federal Constitutional Court 1952-1989, Volume 1/I. 132f.

<sup>303</sup>The concordate was concluded between the German Reich and the Holy Seat on July 20, 1933; See also FN 278.

<sup>304</sup>The principle of democracy in the context of the European Integration not only gave raise to a lively debate in the last years but was also at the centre of the so-called *Maastricht-judgement* of the Bundesverfassungsgericht of October 12, 1993. - BVerfG - 2 BvR 2134/92, 2 BvR 2159/92 - EuGRZ 1993, 429, English translation in: International Legal Materials 1994, 388; CML Rev 1994, 1; For the debate about the democratic principle in the Maastricht-jugement see: *Herdegen, Maastricht and the German Constitutional Court: Constitutional Restraints for an "Ever Closer Union"*, CMLRev 1994, 235.

<sup>305</sup>Compare BVerfGE 14, 215 (197) "Bundesbank"; I shall not, once again, repeat the broad debate of whether the the principle of federal comity can be the basis for only 'accessorial' duties or also for 'independent' duties. This 'merely semantic differentiation' (*Kössinger*) is for our purpose irrelevant, because no 'new or additional' duties of the Länder shall be founded by the Bundestreue. For the debate see: *Schwan, Die deutschen Bundesländer im Entscheidungssystem der Europäischen Gemeinschaften*, 160ff; *Kössinger, Die Durchführung des Gemeinschaftsrechts im Bundesstaat*, 76f.

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relation. The mutual relations, within which the comity is to be respected, must exist or must be founded by negotiations."<sup>306</sup>

For the implementation of European law this will in principle mean that the Länder ought to transpose directives correctly via legislation as well as implementing regulations via administrative measures<sup>307</sup>. If they did not do so it would consequently be a 'misuse of [legislative] freedom'<sup>308</sup>. In such a case the Bund would, according to German doctrine, have the right to enforce compliance by way of federal enforcement<sup>309</sup>. Article 37 GG is as follows:

[1] If a Land fails to comply with its obligations of a federal character imposed by this Basic Law or another federal law, the Federal Government may, with the consent of the Bundesrat, take the necessary measures to enforce such compliance by the Land by way of federal enforcement.

[2] To carry out such federal enforcement the federal government or its commissioner shall have the right to give instructions to all Länder and their authorities.

It is particularly interesting to note that the implementation of European law by Länder would thereby - strangely enough - become an 'obligation of a federal character'. A provision that aims to guarantee the federal principle<sup>310</sup> would thus become functional in the safeguarding of European integration. By federal enforcement the Bund could invoke a substitutive power to legislate<sup>311</sup> as well as give instructions to Länder authorities as regards administration<sup>312</sup>. Doctrine has emphasised that an invoking of a substitutive power can take

<sup>306</sup>BVerfGE 13, 75 (54) "Neugliederung".

<sup>307</sup>See Chapter I. 3.2.

<sup>308</sup>Compare BVerfGE 4, 140 (115) "Hessische Gemeinden"; BVerfGE 14, 215 (197) "Bundesbank"; Grabitz, Die Rechtssetzungsbefugnis von Bund und Ländern bei der Durchführung von Gemeinschaftsrecht, AöR 1986, 31.

<sup>309</sup>In the Austrian Constitution federal enforcement is only foreseen for decisions of the Constitutional Court. It is incumbent on the Federal President and carried out in accordance with his instructions by the organs, commissioned by him thereto by the Federation or the Länder, including the Federal Army.- Article 146, Section 2 B-VG. Up to now there has been no case of such a federal enforcement.

<sup>310</sup>Vogel, Die bundesstaatliche Ordnung des Grundgesetzes, in: Benda/Maihofer/Vogel, Handbuch des Verfassungsrechts, § 22, Rndz 51.

<sup>311</sup>Malanczuk, European affairs and the Länder, CMLRev 1985, 263; Grabitz, Die Rechtssetzungsbefugnis von Bund und Ländern bei der Durchführung von Gemeinschaftsrecht, AöR 1986, 31f; Hailbronner, Die deutschen Bundesländer in der EG, JZ 1990, 157; Ehlers, Die Einwirkungen des Rechts der Europäischen Gemeinschaften auf das Verwaltungsrecht, DVBl 1991, 611; Zuleeg, Die Stellung der Länder und Regionen im europäischen Integrationsprozeß, DVBl 1992, 1332.

<sup>312</sup>As concerns the implementation of Community law according to Article 83 GG by Länder, the Bund also has the power of supervision under Article 84 GG and the following possibilities:

a.) The Federal Government may send commissioners to the highest Land authorities with their consent or, if such consent is refused, with the consent of the Bundesrat, also to subordinate authorities. (Art 84, Section 3 GG)

b.) Should any shortcomings (which the Federal Government has found to exist) in the execution of Community Law in the Länder not be corrected, the Bundesrat shall decide (on the application of the Federal Government or the Land concerned), whether a Land has violated applicable law. The decision may be challenged in the Federal Constitutional Court. (Art 84, Section 4 GG)

c.) With a view to the execution of Community Law, the Federal Government may be authorized by a federal law requiring the consent of the Bundesrat to issue individual instructions for particular cases (addressed to the highest Land authorities unless the Federal Government considers the matter urgent). (Art 84, Section 5 GG)

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place only after having used all other [also non-legal] means<sup>313</sup>. It would thus be an ultima ratio means, the invoking of which necessitates taking the principle of proportionality into consideration. It requires, in addition, the consent of the Bundesrat, i.e. the approval of the majority of the *Länder* executives.

### 1.3. Practical implications

There has been some debate over whether the substitutive power would be only of a temporary character<sup>314</sup>, that is to say that the substitutive measure would automatically lose its force if the respective *Land* takes the necessary measure (particularly the necessary enactment). This solution seems obviously to respect more the autonomy of the *Länder*. This solution has also been enshrined in Article 16, Section 6 of the Austrian Constitution. Nevertheless other authors have stressed the permanent character<sup>315</sup> of the substitutive action.

In addition to the legal limitations, it is obvious that as a consequence of the necessity of consent of the *Bundesrat*, federal enforcement must presuppose at first a broad political consent. It can be presumed that, regardless the party-political confrontation between the so-called A and B *Länder* (*Länder* governed by the SPD or CDU/CSU), *Länder* will stand together to defend their common institutional interest<sup>316</sup> vis-à-vis the Bund. This adds to the notion of *Politikverflechtung*<sup>317</sup> and its consequences for our case. Needless to say such federal enforcement has never taken place in Germany. A similar phenomenon was observed for conflicts between the components of the federal system before the Constitutional Court:

The role of the Court has rather been to clarify boundaries between federal and *Länder* powers, not to move them in one or the other direction. It thus can be said that the decisions of the court on matters of federalism were less path-breaking than those in other fields; [...]. Because the possible opponents take the shaping of the system into their hands, by agreeing about controversial issues and by not fighting them out, the role of the Court as an arbiter is less in demand. The Court, basically, enhanced this essentially 'peaceful' character of the

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d.) The Federal Government can start proceedings against a *Land* before the Federal Constitutional Court. (Art 93, Section 1, Number 3)

e.) The Bund may act by way of federal enforcement. (Art 37 GG)

<sup>313</sup>In this sense e.g. *Grabitz*, Die Rechtssetzungsbefugnis von Bund und Ländern bei der Durchführung von Gemeinschaftsrecht, AöR 1986, 32.

<sup>314</sup>*Zuleeg*, Die Stellung der Länder und Regionen im europäischen Integrationsprozeß, DVBl 1992, 1332; In this sense also *Gubelt*: "[...] that the (legislative) measures are to be repealed as soon the *Land* will fulfil its duties." - *Gubelt* in: *von Münch*, Grundgesetz Kommentar<sup>2</sup> Bd 2, Art 37, Rndz 15.

<sup>315</sup>*Riegel*, Überlegungen zum Problem EG-Richtlinien und nationale Rahmenkompetenz, EuR 1976, 86f; *Riegel*, Gliedstaatskompetenzen im Bundesstaat und Europäisches Gemeinschaftsrecht, DVBl 1979, 250.

<sup>316</sup>In this sense also *Scharpf* who argued that the role of the Bundesrat would be that of a 'switchmen'. - *Scharpf*, Der Bundesrat und die Kooperation auf der dritten Ebene, in: Bundesrat, Vierzig Jahre Bundesrat, Baden-Baden: 1989, 140f.

<sup>317</sup>See Chapter I. 1.2.

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federal system by its only real judicial invention in the field of federalism, namely by creating the concept of *Bundestreue* which requires mutual respect and cooperation.<sup>318</sup>

Given the legal and political restraints that an invoking of a substitutive power must meet, the conclusion of part I of this paper seems to be confirmed: that talking about a substitutive power in the context of cooperative federalism requires an extremely hypothetical argumentation, that its invoking in practice can - with all the legal and political constraints - never take place in a state characterised by sophisticated legal guarantees for Länder and a politico-administrative culture dominated by cooperative patterns. Yet the debate about substitutive powers reveals that theoretical problems as regards the relation of European law to a legal order with different levels of law making and law enforcement remain to exist. Doctrine, though, has approached the problems of coordination between the levels in general from a limited perspective, that is to say a merely legal point of view neglecting the other dimensions<sup>319</sup> of federalism.

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<sup>318</sup>Bothe, The Constitutional Court of the Federal Republic of Germany and the Powers of the German Länder, in: *Orban, Fédéralisme et Cours Suprêmes*, 135f.

<sup>319</sup>Particularly the role of the élites and their patterns of behaviour should be taken into consideration; "[...] that federalism is largely the result not of societies, but of constitutions and the policy-making élites working within them." - *Bakvis/Chandler, Federalism and Comparative Analysis*, in *Bakvis/Chandler* (Ed.), *Federalism and the Role of the State*, 5; This should, though, not neglect the impact of legal institutions on the behaviour of political actors.



## 2. Italy: The *patriarchal* solution

The following chapter will not only show similarities and diversities between federal systems and a regionalist state organisation model in the field of the implementation of EC acts of law, but may - once again - show the difficulties that regionalism<sup>320</sup> had to face even in the decade of its final realisation (i.e. the 1970s). What was brought forward in the early 1960s only by a small part of German doctrine<sup>321</sup>, namely that the state (the Bund) - and not the sub-national entities - should be empowered in general with the transposing and implementation of Community law, was the dominant position in Italy more than a decade later. While the debate in Germany had already shifted to participation of the sub-national level in the decision-making process in matters of European Integration, in Italy the descending phase<sup>322</sup> was to remain at centre of attention for a long period.

It thus seems necessary to give, first, an overview of the development of the competence to implement Community law in Italy. Second, the *status quo* will be outlined with special attention to the *substitutive competence* of the (central) Italian State vis-à-vis the Regions. The reader will become immediately aware of the legal formalism and of the complexity of the regulations in question. Despite the actual changes, it is likely that this features as well as the dominant patterns of behaviour and the attitudes of the political elite will also characterise future developments in this field. I shall thus, once again, stress the dominance of continuity and not on the changes caused by reform. To quote only Georg Jellinek: '[...] also in the new order the power of the past will continue to have an effect.'<sup>323</sup>

### 2.1. The delegated decrees of 1972: Exclusive power of the central state as "starting point"

In 1972 both state legislator and Constitutional Court upheld the principle that the whole implementation of Community law (and international law) would be a responsibility of the (central) state, because it falls within the competence of foreign affairs. In one of the first delegated decrees, which in January 1972 transferred administrative functions and personnel from the state to the regions, the central state reserved (not only the international relations and the relations to the EC but also) the right to implement regulations, directives and other acts of the EC which concern price and market politics, trading in agricultural products and

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<sup>320</sup>The historic background of Italian regionalism has often been told and is not to be repeated here once again. For the long and arduous way from regions to regionalism as an example for the "freezing" (congelamento) of the Italian Constitution of 1948, which in a second period was only realized very slowly, see for example: *Balboni/Pastori, Il governo regionale e locale*, in: *Amato/Barbera, Manuale di diritto pubblico*, 576ff.

<sup>321</sup>Compare Chapter II. 1.2.

<sup>322</sup>For participation in the 'ascending' phase in Italy see: *Agostini, The Role of the Italian Regions in Formulating Community Policy, The International Spectator* 1990, 87.

<sup>323</sup>Jellinek, *Gesetz und Verordnung*, Aalen 1964, 114 - reprint of the edition of 1887.



interventions in the matter of agricultural structures<sup>324</sup>. This position of the central state was confirmed only a few months later by the Constitutional Court, which argued that reference to article 189, section 3 EC-Treaty, which refers to the internal organisation of each member state, would be insufficient for claiming unconstitutionality of central state's "implementation-power" to. In *sentenza 24 luglio 1972, n.142*<sup>325</sup> he stated:

"[...] that every distribution of the power to implement Community rules which would be in favour of the minor authorities differing from contracting state (which is, although, responsible for observing and fulfilling its obligations assumed vis-à-vis the Community), presupposes that the central state is in possession of appropriate means to assure the implementation also in case of inertia by the regions invested to implement Community rules. Such means are, although, absent in our legal system and cannot, in addition, be substituted by state's competence in policy and coordination according to article 17 of the legge di delegazione<sup>326</sup>, which provides no shelter against inobservance [...]."

It seems to me questionable that the *state's competence in policy and coordination* cannot be an appropriate means to ensure implementation of Community law, given the wide range of powers it offers. "Invented in the silence of the Constitution"<sup>327</sup> by article 17 legge n.281/1970 it gives, in brief, the state the possibility to issue directives<sup>328</sup> or to pass a law<sup>329</sup> also in the field of competences attributed to the regions by article 117 CI. Although the CC emphasised the principle of legality (*sentenza n.150/1982*) as well as the principle of proportionality (*sentenza n.170/1988*), the Italian State exercised the *competence in policy and coordination* in a very detailed manner<sup>330</sup>. This often led to a real expropriation<sup>331</sup> of the regions also in the area of their legislative competence under article 117 of the Italian Constitution. Even though

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<sup>324</sup>articolo 4, lettera a e b del d.P.R. 15 gennaio 1972, n.11 (Trasferimento alle Regioni a statuto ordinario delle funzioni amministrative statali in materia di agricoltura e foreste, di caccia e di pesca nelle acque interne e dei relativi personali ed uffici), G.U. suppl. ord. n.46 del 19 febbraio 1972; Compare also d.P.R. 15 gennaio 1972, n.10 (Trasferimento alle Regioni a statuto ordinario delle funzioni amministrative statali in materia di istruzione artigiana e professionale e del relativo personale), G.U. suppl. ord. n.41 del 14 febbraio 1972, articolo 7, lettera b: Restano ferme le competenze degli organi statali in ordine: (...) alla vigilanza ai fini dell'osservanza della legislazione sociale); The (delegated) decrees were based on article 17 of the legge 16 maggio 1970, n.281 ("financial-law") which - as a legge delega or legge di delegazione- conferred the right to issue legislative decrees (decreti legislativi, compare article 76 CI) concerning the passage of functions and personal, attributed to the regions by article 117 of the Italian Constitution and foreseen by article VIII disp. trans. e fin. of the Italian Constitution, to the government.

<sup>325</sup>CC, *sentenza 24 luglio 1972 ("Agriculture")*, Giur. Cost 1972, 1451 (1432)

<sup>326</sup>This refers to the legge 16 maggio 1970, n.281.

<sup>327</sup>*Pastori*, Il governo regionale e locale in: *Amato/Barbera*, Manuale di diritto pubblico, 584.

<sup>328</sup>deliberazione del Consiglio dei Ministri, deliberazione delegata.

<sup>329</sup>legge, atto avente forza di legge.

<sup>330</sup>The CC confirmed the constitutionality of the central state's power in policy and coordination in numerous decisions: In *sentenza 4 marzo 1971, n.39* (Foro Italiano 1971, 1180ff) he stated that the creation of this competence "lay in the discretion of the state legislator, and would thus not be arbitrary". Furthermore, it would be "only the other side of the limit of the national interest" (art. 117 CI); Compare also: CC, *sentenze nn. 150/1982, 340/1983, 195/1986, 64/1987, 177/1988, 242/1989*.

<sup>331</sup>*Bartole/Mastragostino/Vandelli*, Le autonomie territoriali, 189; *Martines/Ruggeri*, Lineamenti di diritto regionale, 293.

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article 3 of legge n.382/1975 added the term "Community obligations" to the tasks of the *state's power in policy and implementation*, which were enshrined in article 17 lit a of legge n.281/1970 with "the safeguarding of unitarian necessities, also in the field of economic planning, and of international obligations", the detailed and broad use of the *competence in policy and coordination* by the Italian State should satisfy unitarian necessities<sup>332</sup>.

Given the well-known use the Italian State has made of the *power in policy and coordination*, one cannot easily argue that this competence would have left the state in a position of "helplessness" vis-à-vis the regions, or that it was not a suitable means of ensuring the implementation of Community law. It is nevertheless implicit in the decision of the Constitutional Court that other appropriate means of ensuring the regions' implementation of Community law must be created, before entrusting them with the implementation of Community law. A substitutive power was, however, not explicitly mentioned by the Constitutional Court in 1972.

The argumentation of the CC that article 189, section 3 EC Treaty would not be relevant for the case is debatable as well. If this provision would have been taken into consideration the outcome would have been significantly different. The CC could thus stress unwritten preconditions inherent in international law (such as the possession of appropriate means), and not rely on the competences guaranteed to the regions by the Italian Constitution.

In sentenza n.142/1972 the CC pleaded simply for "the creation of necessary means" when the power to implement Community law should be assigned to the regions. Three years later the legislator created a means that was intended to guarantee correct implementation by regions. In legge 22 luglio 1975, n. 382, which entrusted to the government the power to transfer the functions under article 117 CI to the regions, a *substitutive competence of the central state* was foreseen in case of *persistent inactivity*<sup>333</sup>.

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<sup>332</sup>This can be seen also in endless controversies especially between the autonomous provinces Trento and Bozen and the Italian State before the Constitutional Court. Compare the decisions of the CC in FN 330 above.

<sup>333</sup>legge 22 luglio 1975, n. 382 (Norme sull'ordinamento regionale e sulla organizzazione della pubblica amministrazione), Art. 2:

In caso di persistente inattività degli organi regionali nell'esercizio delle funzioni delegate, qualora le attività relative alle materie delegate comportino adempimenti da svolgersi entro termini perentori previsti dalla legge o risultanti dalla natura degli interventi, il Consiglio dei Ministri, su proposta del Ministro competente, dispone il compimento degli atti relativi alla sostituzione dell'amministrazione regionale.

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## 2.2. The legge n.153/1975: A solution "*in the middle of the road*"

A similar provision is to be found in article 27 legge 9 maggio 1975, n. 153, concerning the implementation of directives issued by the Council of the European Community in the field of agricultural reforms<sup>334</sup>. This provision was cause for several regions to lodge a complaint before the Constitutional Court<sup>335</sup>, lamenting that article 27 legge n.153/1975 would invade their competences under the Italian Constitution<sup>336</sup> and their respective statutes.

The CC stated in sentenza n.182/1976:

[...] that membership of the Community limits the sovereignty of the state and must therefore have repercussions on the autonomy (of the regions and the autonomous provinces), which is subordinated to international obligations as well as to the national interest, [and] that if the regions were empowered to implement Community directives and the state would lack a substitutive competence, the latter would be completely disarmed in case of region's inertia.

Although the Court did not exclude<sup>337</sup> that regions could be 'competent national authorities according to article 189, section 3 EC Treaty', it again emphasised the responsibility of the state vis-à-vis the Community.

As regards the conditions under which the substitutive power could be invoked by the state, the Court stated that given that it presupposes an inactivity extended beyond every reasonable limit (and not only in observance of terms set up by law) and a hearing of the president of the regional council (of the affected region), the substitutive power would also be adequate and appropriate. The draft made by the *Comissione affari costituzionali*<sup>338</sup>, however, contained in addition three other conditions: first, that the state is held internationally responsible (i.e. that the ECJ would have decided that Italy had not fulfilled its obligations); second, that the parliamentary commission for regional questions had been consulted; third, that a deadline, set by the government, had passed. It seems evident that these requirements would have guaranteed the *ultima-ratio-character* of the state's substitutive power more than

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<sup>334</sup>legge 9 maggio 1975, n. 153 (attuazione delle direttive del Consiglio delle Comunità europee per la riforma della agricoltura) Art. 27:

In caso di persistente inadempimento degli organi regionali nello svolgimento delle attività amministrative di attuazione delle direttive comunitarie di cui all'art. 1, il Consiglio dei Ministri, su proposta del Ministro per gli affari esteri o del Ministro per l'agricoltura e le foreste, sentito il presidente della giunta regionale interessata, autorizza il Ministro per l'agricoltura e le foreste a disporre il compimento degli atti relativi in sostituzione dell'amministrazione regionale, proponendo, ove occorra, le opportune variazioni di bilancio.; The provision thus offers only a sectoral solution.

<sup>335</sup>CC, sentenza 22 luglio 1976, n. 182 ("Agriculture-Community directives"), Giur.Cost. 1976 I, 1138ff.

<sup>336</sup>i.e. Art. 116, 117, 118 CI.

<sup>337</sup>Here the position of the CC has changed slightly compared with sentenza n.142/1972.

<sup>338</sup>Amato/Caretti/Condorelli, Le Regioni e l'attuazione delle direttive comunitarie in agricoltura: una vittoria o una sconfitta?, Le Regioni 1975, 887f.



article 27 of *legge n.153/1975* did. It seems then that, in spite of the judgement of the Constitutional Court<sup>339</sup>, the state has quite considerable discretionary powers. This is particularly evident if one compares this conditions with the constraints of the federal enforcement in Germany. The 'extension beyond every reasonable limit' is subject to interpretation and the hearing of the president of the regional council is a merely formal restraint.

### 2.3. Substitutive power today: Are regional autonomy and international obligations subordinated to the national interest?<sup>340</sup>

The above-quoted conditions were finally enshrined in Article 6 of *d.P.R. 24 luglio 1977, n.616*<sup>341</sup> which states, as follows:

The competence to implement regulations of the European Economic Community as well as the bringing into force of there directives, which have to be converted into state laws indicating explicitly the fundamental principles, is transferred to the regions in the matters defined by this decree.

In the absence of a regional law, the state law is to be observed in all its provisions.

In case of verified inactivity of the regional authorities, which brings with it the risk of non-compliance with international obligations, the government may prescribe with deliberation of the Council of Ministers, having heard the opinion of the parliamentary commission for regional questions and the interested region, a congruent time-limit to provide for measures. If the inactivity of the regional organs continues after the deadline, the Council of Ministers may adopt the necessary measures in substitution of the regional administration.

Thereby the competence to implement Community regulations and Community directives in the field of article 117 of the Italian Constitution was finally transferred to the regions. In fact *d.P.R. n.616/1977* was an important step in the progressive recognition that regions are empowered to implement and transpose Community law.

By virtue of article 6 *d.P.R. n.616/1977*, however, the Community directives had to be converted into state laws before being implemented by the regions. In reality, conversion into

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<sup>339</sup>CC, sentenza 22 luglio 1976, n.182: "Il legislatore ha regolato questo potere sostitutivo con opportune ed idonee garanzie."

<sup>340</sup>The question refers to a judgement of the Italian Constitutional Court (sentenza n.182/1976) in which it stated that the regional autonomy is subordinated to international obligations as well as to the national interest.

<sup>341</sup>For the legal basis, see: art. 1 *legge 22 luglio 1975, n. 382* and *articolo unico legge 27 novembre 1976, n. 894*; Compare also article 2 of the delegation law ( *l. n.382/1975*), which foresaw the state's substitutive power, which, however, is identical to article 27 of *legge n.153/1975*.



state law was not only often tardy but was even "occasionally of episodic nature"<sup>342</sup>. This did not change when article 12 of legge n.183/1987<sup>343</sup> (*legge Fabbri*) obliged the government to make a draft for the conversion law in the shortest period of time possible.

Article 2 of the legge 9 marzo 1989, n.86 (*legge La Pergola*) then stated that this is to be done annually by a so-called *legge comunitaria*, the task of which is periodic adaptation of the Italian legislation to Community legislation<sup>344</sup>. It has been criticised that the *legge La Pergola*, designed to provide a framework for implementation of Community legislation, was only enacted on a statutory level and not as a provision of the Constitution. Its impact on a parliament that is not bound by it and thereby the future practice of implementation would be uncertain<sup>345</sup>. Given the recent developments in Italian politics, it seems to me that the argument that the *legge La Pergola* '[might be] of a dubious legal basis but widespread acceptance in political circles'<sup>346</sup> could not be maintained.

The requirement of a conversion of EC directives into state law in the field of regional competences led to harsh criticism<sup>347</sup> by doctrine, according to which the legislative conversion would either be in vain because of repeating only the content of the (already very precise) directive or would be unconstitutionally invade the regional competences because of its extremely detailed character. In addition, it may - and did - result in the regions' incapacity<sup>348</sup> to implement Community directives not converted into a state law. The primary

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<sup>342</sup>Marzona, *Struttura giuridica dell'amministrazione nel confronto tra diritto comunitario e diritto interno* in: Angiolini/Marzona, *Diritto comunitario - diritto interno: effetti costituzionali e amministrativi*, 69.

<sup>343</sup>legge 16 aprile 1987, n.183 (Coordinamento delle politiche riguardanti l'appartenenza dell'Italia alle Comunità europee ed adattamento dell'orientamento interno agli atti normativi comunitari); Tizzano, for example, argued that the title of the legge Fabbri would be more ambitious than the real content. - Tizzano, *Sull'attuazione della normativa comunitaria in Italia: legge n.183/1987*, *Il Foro Italiano* 1988, 219.

<sup>344</sup>Article 1 of the legge n.86/1989 (Norme generali sulla partecipazione dell'Italia al processo normativo comunitario e sulle procedure di esecuzione degli obblighi comunitari) solemnly emphasizes "that through the measures foreseen in this law the Italian State guarantees the fulfillment of the obligations resulting of its membership of the European Communities"; Compare also article 3; Gaja, *New developments in a continuing story: The relationship between EEC law and Italian law*, CMLRev. 1990, 90.

<sup>345</sup>Gaja, *New developments in a continuing story: The relationship between EEC law and Italian law*, CMLRev. 1990, 90.

<sup>346</sup>Tizzano, *Note introduttive alla legge La Pergola*, *Il Foro Italiano* 1988, 324ff.

<sup>347</sup>Compare, for example: D'Atena, *Zur Problematik von EG-Richtlinien vornehmlich in Italien*, Europa-Institut der Universität des Saarlandes Nr.79, 28 f; Onida, *Il ruolo delle regioni nel sistema comunitario*, *Le Regioni* 1991, 7ff.

<sup>348</sup>Only the regions with a special statute and the autonomous provinces, Trento and Bozen, are, according to article 13 of legge n.183/1987 and to article 9 of legge n.86/1989, enabled to implement EC directives immediately; The possibility of constructing by mere linguistic interpretation of article 9, number 2 legge *la Pergola* a competence of regions with ordinary statutes to implement Community directives, if the state legislator has missed a conversion in the first legge *comunitaria* enacted after the notification of the EC directive, is here ignored. First, because it was obviously not the aim of the quoted provision and could even be understood as a reversal of the provision; second, because it is not very clear which deadline is to be applied (has the parliament to postpone the enactment of a legge *comunitaria* when a Community directive was notified only a few days before the date of the voting?); third, because a later enacted state-law also requires a modification of a regional-law, which thereby assumes only interim character (this certainly





aim of the *legge La Pergola*, namely to improve the Italian performance in implementing Community legislation, is thereby partially frustrated in the case of the regions. *La Pergola* said:

Le inadempienze vanno rimosse ed evitate: offuscano l'immagine dell'Italia e compromettono la nostra credibilità nel consenso europeo. L'Italia detiene, in ambito comunitario, un mortificante primato. Il nostro atteggiamento è stato più volte sanzionato dalla Corte di giustizia. [...] Resta il fatto, però, che il nostro contenzioso per inadempimento è anormalmente elevato, in senso sia assoluto, sia relativo; inoltre - ed è forse il dato più significativo - esso è in larga parte costituito da mancati recepimenti di direttive. Sono vicende che denotano incapacità a mantenere il ritmo della produzione comunitaria.<sup>349</sup>

Comparing the figures<sup>350</sup> of the suspected infringements of Community legislation by the Italian Republic in the years 1988-1992 a substantial improvement after the enacting of the *legge La Pergola* is not visible. However, this should not be understood as a fundamental critique of the *legge La Pergola* and the foreseen *legge comunitaria*, which undoubtedly has its merits: it gives a good overview of Community directives, takes the judgements of the ECJ into account and categorises the EC legislation according to the means necessary for implementation<sup>351</sup>.

Community directives require a two-step legislative procedure: in Italy it is the state that in substance takes the second step. The question of the role of the Italian regions in the 'ascending' phase is beyond the scope of this paper. It should here be noted that the Italian regions do not participate in the decision-making process in European matters in a comparable way to the *Länder* in Germany or Austria. The regions are to be informed of Community recommendations and directives within 30 days (article 10 *legge n.183/1987*), and an opinion of the *Conferenza Stato-Regioni* (article 10 *legge n.86/1989*) is not (legally) binding. The state is not even obliged to give reasons for a deviation from this statement. Apart from the legal restraints Italian regions meet in the participation in the decision-making process in European matters, patterns of 'cooperative federalism' are rather underdeveloped in Italy.

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does not encourage the regions to implement Community directives). This interpretation in favour of the regions with normal statute (and also the fulfilling of Community obligations) has also had an influence on German literature. See: *Engel, Regionen in der EG - Rechtliche Vielfalt und integrationspolitische Rollensuche*, 149f.

<sup>349</sup> *La Pergola*, Relazione ad un proprio disegno di legge, *Atti Senato*, X Legislatura, n.835.

<sup>350</sup> 1988: 245 1989: 285 1990: 255 1991: 177 1992: 207 - Commission of the European Communities, Tenth Annual Report on the monitoring of the application of Community law 1992, 152; The optimism expressed by some scholars must thus be revised. Grottanelli Santi, for example had argued, that "the implementation process of EC norms is very likely going to change after the adoption of the law no. 86 of 1989". - *Grottanelli de Santi*, The impact of EC integration on the Italian form of government, in: *Francioni* (ed.), *Italy and EC Membership Evaluated*, 185.

<sup>351</sup> a.) legislative delegation to the government; b.) legislative delegation to the government requiring the opinion of a permanent parliamentary commission; c.) regulation; d.) administrative action.

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However, Community directives are not brought into force before the state has 'converted' them via the annual 'legge comunitaria'. This can neither favour a prompt realisation of the tasks of Community law nor does it promote the regional autonomy. It seems to me that the notion of 'supremacy' of national interests (i.e. of central policy) is dominant. As regards the substitutive power of the central state one can only wonder what role this competence should play in this situation. It seems paradoxical that a state that has such a strong position as regards the implementation of Community law should, in practice, have any additional need for a substitutive power. In this light the argumentation that the central state would otherwise be 'completely disarmed' also seems rather puzzling. It has to be noted that the substitutive competence as put into concrete terms by the *legge La Pergola* concerns regions with normal statutes as well as regions with special statutes and the autonomous provinces<sup>352</sup>.

Looking at the formal conditions for an invoking of a substitutive power it is apparent that the different organs of the (central) states bureaucracy participate to a large extent. The Minister for the Coordination of Community Politics initiates the invoking of the substitutive competence<sup>353</sup>. Article 11 of the *legge La Pergola* states that he must act in agreement with the Minister for Regional Affairs and the minister competent for the respective materia. A hearing of the parliamentary commission for regional questions and the interested region then takes place. The council of ministers shall set up a deadline for the region to provide for the required measures. If the inactivity of the region will continue after the setting of this time-limit the government may take a substitutive action (the president of the interested region then participates in the council of ministers with a consultative opinion). The invoking of the substitutive measure is, in practice, entrusted to an ad-hoc commission<sup>354</sup>. This three-member commission (one administrative judge and a member designated by the interested region) is headed by the *commissario del governo*<sup>355</sup>.

Apart from the fact that the above procedure might be perceived as a good example of extreme legal formalism and of demands of different bureaucratic apparatuses, the practical implications of such a procedure should not be forgotten. The invoking of a competence that requires the cooperation of different ministries within a coalition government must necessarily be determined primarily by 'party reasons' and not necessities of integration or regional

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<sup>352</sup>*La Pergola* argued: "Inoltre la funzione sostitutiva così regolata viene estesa alle Regioni a statuto speciale e alle Province autonome nella considerazione che le particolari garanzie a queste ultime non comportano un esonero dal limite dell'osservanza degli obblighi assunti unitariamente dallo Stato nei rapporti con le Comunità europee." - *La Pergola*, Relazione ad un proprio disegno di legge, Atti Senato, X Legislatura, n.835.

<sup>353</sup>Due to the fact that it is the state which is responsible for converting EC directives into legislative measures the substitutive power of the central state will mainly concern single administrative measures.

<sup>354</sup>*La Pergola* spoke of an *organo straordinario*. - *La Pergola*, Relazione ad un proprio disegno di legge, Atti Senato, X Legislatura, n.835.

<sup>355</sup>The figure of the *commissario del governo* is, as is shown in many analyses, an illuminating example of the politico-administrative culture of Italy. See: *Pochmarski*, Der Regierungskommissär - Organ der Verbindung italienischer Staat-Regionen, Diplomarbeit, Graz 1992 with further references.

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autonomy demands. In addition, experience has shown that regional questions were in general subordinated to party interests<sup>356</sup>. A probable result might thus be political bargaining on the national (party or government) level in order to determine the 'national interest'. To bring this interest to the fore, though, the central state has more effective instruments at its disposal than the complex ultima ratio competence named *potere sostitutivo*. In addition, due to the fact that the causes for the poor implementation performance of the Italian Republic lie on another stage, this competence will not be of relevance as regards the improving of the implementation performance. Correctly it has been argued that in Italy "[...] when we turn from grand decisions to implementation, the degree of Europeanism declines"<sup>357</sup>.

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<sup>356</sup> Compare for example: *Spotts/Wieser, Italy. A Difficult Democracy*, Cambridge: Cambridge University Press, 1986, 229.

<sup>357</sup> *Cotta, European integration and the Italian political system*, in: *Franconi (ed.), Italy and EC Membership Evaluated*, 206.



### 3. Austria

With Austria joining the European Union the number of Member States with a federal structure will increase. This is not the place to deal with the long and arduous road<sup>358</sup> that led, first, to the decision of the Austrian council of ministers of July 4, 1989 and the "letter to Brussels" of July 17, 1989 (in which Austria applied for the three Communities) and, second, to the overwhelming result of the referendum of June 12, 1994 when 66.6% of the Austrian voters decided in favour of the constitutional law regarding the accession to the European Union (*Beitritts-Verfassungsgesetz*).

Neither will this chapter focus on an evaluation of interests of the (different) regional actors and their representation in the process of European integration. I shall refer here only to the exhaustive study of *Michael Morass*<sup>359</sup>. However, since the joining of the EEA (that entered into force on January 1, 1994) and the European Union (January 1, 1995) have brought (and will bring) with it several changes<sup>360</sup> of the Austrian Constitution, it will be necessary to give a brief summary of the most recent developments. It should be said that the amendments to the Austrian Federal-Constitutional Law are not yet conclusive. This concerns particularly the *federal state reform* (*Bundesstaatsreform*). While the constitutional law regarding supporting measures for the accession to the EU (*Bundes-Verfassungsgesetz-Novelle 1994*, BGBl 1994/1013, 21.12.1994) was enacted only a few days before the accession to the Union, the *federal state reform* was unexpectedly cancelled from the agenda. The *federal state* (or structural) *reform* has been subject of intense debates and negotiations in the last legislature (GP XVIII). The political pactum between the *Länder* and the *Bund* signed on October 8, 1992 stressed the context with Austria's accession to the European Union<sup>361</sup>. This is not the place to evaluate the reasons that caused the failure of the federal state reform in December 1994. The national elections of October 9, 1994 have changed the political landscape of Austria totally: the two coalition parties (the former two big parties) do no longer dispose over a two-third majority in parliament necessary for amendments to the Constitution. So for the enactment of projects like a *structural reform* new coalitions will be necessary. As already pointed out it is inherent to federal systems that they never stand still. It necessarily follows that every description and

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<sup>358</sup>For the history see *Schneider*, *Gerader Weg zum klaren Ziel? Die Republik Österreich auf dem Weg in die Europäische Union*, ÖZP 1994, 5.

<sup>359</sup>*Morass*, *Länderinteressen und EG-Beitritt - Wandel der Beziehungen zwischen Ländern und Bund in Österreich angesichts ihrer Integration ins "Dreiebenensystem" der Europäischen Gemeinschaften*, Ph.D. Thesis European University Institute, Florence, 1992; revised version: *Regionale Interessen auf dem Weg in die Europäische Integration*, Wien: Braumüller, 1994.

<sup>360</sup>*Alois Mock*, Austrian Foreign Minister, recently stressed "the necessity of inner-state legal adaptations (...) due to membership in the EC" - *profil* 1993/46, 22; *Heinz Fischer*, President of the National Assembly, argued "that it is the democratic thought which calls for accompanying measures on the constitutional level - and not only a referendum - in the course of the coming closer of Austria to the EC." - *Fischer*, *Die europäische Demokratie auf dem Prüfstand*, *Europäische Rundschau* 1993/4, 84; *Thomas Klestil*, Federal President, said "that European Integration will led to important changes in the inner-state structure of Austria. In particular, this is a great challenge to the federal principle." - *Präsidenschaftskanzlei*, *Ansprache von Bundespräsident Thomas Klestil anlässlich des Festaktes "75 Jahre selbständiges Land Vorarlberg"* am 3.11.1993, 3.

<sup>361</sup>"[...] the European Integration will bring with in a fundamental new quality in the relations between the territorial entities" - preamble of the political pactum.

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evaluation of developments in this context can assume only a provisorial character. Nevertheless some concepts and trends should at least be sketched out. I will refer here particularly to the proposal of the government of summer 1994<sup>362</sup>. In spite of the failure of this proposal it seems useful to me to highlight some of its contents as far as they are relevant for the concept of substitutive competences. In addition this proposal might be a good basis for the next debate<sup>363</sup> about *federal state reform*.

### 3.1. The Länder's competence in administration - main feature of Austrian federalism

Although, during the federal-state reform attempts were made to give the *Länder* more legislative competences<sup>364</sup> it should be pointed out that the strength of Austrian federalism remains to be based on a strong *Länder*'s competence in the field of administration rather than on their competence to legislate. The fact that Article 15, Section 1 B-VG reserves - in the form of a general clause - all competences (in legislation) not attributed to the Federation for the *Länder*'s independent area of competence (*selbständiger Wirkungsbereich*), might be misleading. Either in the so-called competence articles (Article 10 to 15 B-VG) or in additional provisions outside the Federal-Constitutional Law the competence in legislation for all important matters is attributed to the Bund. The project of federal-state reform thus contained a (demonstrative) enumeration of the competences of the *Länder* in the field of legislation in the new Article 15 B-VG. In addition the legislator ought to incorporate<sup>365</sup> every change in the division of competences<sup>366</sup> (in the area of legislation as well as administration) within the Federal-Constitutional law (Art 44, Section 2 B-VG new<sup>367</sup>).

The main feature of the Austrian federalist system is (and will be in the future) that - in general - it is the *Länder* (i.e. the Land governor) that are competent to implement laws of the Federation via individual administrative acts. It is significant that this system is called administrative-federalism<sup>368</sup> (*Vollzugsföderalismus*) or *executive-federalism*. This scheme would

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<sup>362</sup>1706 Blg Sten Prot NR GP XVIII.

<sup>363</sup>For this debate see: *Pochmarski*, Noch einige Anmerkungen zur Bundesstaatesreform, *Journal für Rechtspolitik* 1995/1 (forthcoming).

<sup>364</sup>For a critique of the division of competences compare: *Pernthaler*, Kompetenzverteilung in der Krise - Voraussetzung und Grenzen der Kompetenzinterpretation, Wien: Wilhelm Braumüller, 1989; Bundeskanzleramt-Verfassungsdienst (Hrsg.), Neuordnung der Kompetenzverteilung in Österreich, Wien: 1991.

<sup>365</sup>The influence of the incorporation-duty embodied in Article 79[1] of the German Basic Law cannot be ignored.

<sup>366</sup>It should be noted that it was an amendment in 1984 that gave the *Länder* a right of veto against changes in the competence system that affect them (via a two third majority in the Federal Council). Compare B-VG Nov 1984: BGBl 1984/490.

<sup>367</sup>In the following "new" will refer to the government proposal of *federal-state reform* (1706 Blg Sten Prot NR GP XVIII).

<sup>368</sup>It has also been stressed that the administrative federalism is a sort of compensation for the weak position of the Austrian *Länder* in legislation. - *Adamowich/Funk*, Österreichisches Verfassungsrecht, 127, 276.



not have changed in principle with the proposed *federal-state reform*. According to the so-called 'political pactum' between the *Bund* (i.e. the Bundesregierung) and the *Länder* (i.e. the Conference of the Land governors) of October 8, 1992 and the proposal of the government of summer 1994<sup>369</sup>, the former indirect federal administration<sup>370</sup> (*mittelbare Bundesverwaltung*) should have become part of the *Länder's* independent area of competence<sup>371</sup>. This aimed to give the *Länder* more autonomy<sup>372</sup>.

In the *indirect federal administration* the *Bund* (i.e. the individual ministers or the council of ministers) has the right to issue instructions vis-à-vis a *Land* governor (Art 103[1] and 20 [1] B-VG) and to indict him before the Constitutional Court, in case of non-compliance with such instructions or with general regulations (Art 142[2] lit e B-VG<sup>373</sup>). In practice neither instructions nor legal sanctions have played a relevant role since 1945. Only once in the second republic was a *Land* governor indicted for culpable legal contravention for not obeying an instruction<sup>374</sup>. In this context *Jürgen Weiss*, former Minister for Federal Affairs, said that 'an instruction (*Weisung*) is a myth rather than an effective means'<sup>375</sup> given the number of instructions not obeyed and the fact that there has only been one case where a *Land* governor was made legally responsible.

The federal-state reform would have put an end to this fiction of hierarchical interference<sup>376</sup>. However, it was considered necessary that the *Bund* be able to interfere in the *Länders'* implementation of federal laws.

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<sup>369</sup>1706 Blg Sten Prot NR GP XVIII.

<sup>370</sup>For a legal analysis of the indirect federal administration see the exhaustive study of *Weber*, *Die mittelbare Bundesverwaltung*, Wien: Wilhelm Braumüller, 1987.

<sup>371</sup>In the framework of the *Lands'* administration this means that the competence will pass from the *Land* governor to the *Land* government as a whole. Up to now administrative acts in the *Lands'* independent area are signed in the name of the *Land* government, while acts of indirect federal administration are signed in the name of the *Land* governor.

<sup>372</sup>It should be noted that this tendency is counterbalanced by the attribution of more and more competences to administrative courts (*Unabhängige Verwaltungssenate in den Ländern*) to decide in individual administrative cases.

<sup>373</sup>The Constitutional Court has the following three possibilities: a. to deprive the *Land* governor of his office b. to deprive him - in addition - temporarily of his political rights c. to declare that the behaviour of the *Land* governor was illegal (in minor cases) - only sanction c was once imposed; An indictment before the Constitutional Court is now also foreseen for the Austrian representative in the Council - Art 142[2] lit c (BGBl. 1994/1013). See Appendix III.

<sup>374</sup>see FN 215.

<sup>375</sup>*Weiss*, *Die Umweltverträglichkeitsprüfung als Teil der Verwaltungsreform*, in: *Kohl/Ofner/Stirnemann*, *Österreichisches Jahrbuch für Politik* 93, 460.

<sup>376</sup>It should be noted that Article 10[3] B-VG new would have allowed the administration of matters that fall under the *Bund's* competence in legislation and administration (direct federal administration) to be delegated to *Land* authorities. In this delegated federal administration the *Bund* would have had the right to issue instructions. The same is true for the administration of federal properties which was planned to be entrusted to *Land* authorities (Article 104[1] and [2] B-VG new) and the administration of federal buildings (Article 15 B-VG new). In these cases or if information rights are hindered (Art 102 B-VG new) or in the case of non-compliance with a ministerial request (Art 103 B-VG new), the federal government would also have had the possibility to bring members of a *Land* government before the Constitutional Court (Article 142[2] lit d B-VG new). For Art 102, 103 B-VG new see below.



Knowledge about the implementation phase is - as for the implementation of European law - an indispensable precondition to being able to exercise an efficient influence. Thus the programmed amendment should have enshrined the *Bund's* right to inspect records and the obligation of the *Länder* to give information about the implementation of federal laws (Art 102 B-VG new). A hindering of these rights would have constituted a reason for the impeachment of a *Land* minister before the Constitutional Court (Article 142[2] lit d B-VG new)<sup>377</sup>.

To exert influence on the *Länder's* implementation of federal laws it was proposed that the Bund should have the following three instruments available:

- a. the possibility of substitutive action for administrative acts in situations of emergency (Art 103 B-VG new) - *Kompetenzübergang*
- b. the right to appeal before the administrative court (*Verwaltungsgerichtshof*) in the case of dilatoriness in the issuing of an individual administrative decision (*Bescheid*) (Art 132, Section 2 B-VG new) - *Säumnisbeschwerde*
- c. the right to appeal before the administrative court in the case of unlawfulness of an individual administrative decision (Art 131, Section 1, Z 2 B-VG) - *Amtsbeschwerde*

Substitutive competences have a longer tradition in the Austrian constitutional system<sup>378</sup>. In this context the substitutive competence of the Bund as regards the implementation of international treaties by *Länder* is of particular relevance (Article 16[4] B-VG<sup>379</sup>). Substitutive powers, however, have never been the subject of a special study. There has been a tendency towards proliferation<sup>380</sup> in recent years.

One article of the proposed federal-state-reform merits particular attention: Art 103 B-VG new. This article is an emergency provision. If the competent organ of a *Land* fails to implement an administrative act which should be done ex officio in order to remedy grievances that endanger life and health of persons or to avert an obvious and not redressable damage to the general public or to avoid a serious financial damage for the *Bund*, the competent minister can request that the *Land* government implement this act within a reasonable time limit. If this time limit passes, the minister can declare vis-à-vis the *Land* government that the competence for this measure has now been delegated to him. In addition, the federal government can impeach the competent member of the *Land* government for non-compliance with a ministerial request before the Constitutional Court (Article 142[2] lit d B-VG new).

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<sup>377</sup>The outcome of this procedure is the same as in an impeachment of a *Land* governor - compare FN 373.

<sup>378</sup>Art 12[3] B-VG regarding individual administrative acts in matters of electricity when more than one *Land* is concerned and the different authorities cannot reach an agreement in the matter; Art 15[6] frame legislation of the Bund.

<sup>379</sup>Enshrined in Article 16[1] B-VG by amendment 1974 (BGBl 1974/444); now Article 16[4] B-VG (BGBl 1992/276); For a comparison with other federal systems see: *Dehousse, Fédéralisme et relations internationales*, 80ff.

<sup>380</sup>1988: 16[3] B-VG; 1992: Art 16[6] B-VG; proposal of 1994: Art 11[9] B-VG new, Art 16[5] new; Art 103 B-VG new; Art 12[3] B-VG new will deal with the frame legislation of the Bund [and thus replace Art 15, Section 6 B-VG]; Art 15[4] new will deal with individual administrative acts in the cases of Art.11, 11a, 12, 14[2] and [3] and 14a[3] and [4] when more than one *Land* is concerned and the *Länder* are not able to reach an agreement in the case [and thus extend and replace Article 12, Section 3 B-VG].

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It is particularly interesting that the Land has to bear the costs if the Bund has used its substitutive power 'rightly'. This allows it (albeit very indirect) control of lawfulness before the Constitutional Court. If the Land does not pay the costs demanded by the Bund and the Bund sues the Land according to Art 137 B-VG (*Kausalgerichtsbarkeit*<sup>381</sup>) before the Constitutional Court, the latter must examine the lawfulness (as a precondition). The *Verfassungsgerichtshof* can not, however, declare the act void under Art 137 B-VG. The delegation of competence takes place if only the formal conditions (i.e. declaration of the federal minister) are fulfilled. This substitutive action is thus of permanent character. Thereby a weakness in the system of Austrian constitutional jurisprudence is made visible. Actions are strictly limited and related to a certain federal-state model. Amendments of the constitution regarding the relation of Bund and Länder will thus not always suit the actions available. Here the advantage of a general clause for litigation between Bund and Länder - as embodied in Article 93[1] of the German Basic Law - is particularly obvious.

With the federal-state reform, the Austrian system, always based on criteria of competence rather than of hierarchy, would have become even more complex. Indeed yet the characterisation of Pizzorusso's description seems apt:

"[...] a very complex general framework typical of a federally structured system, in which law-making and law-enforcement are placed at different levels in a web of relationships so closely woven as to be perhaps unequalled even in similar systems."<sup>382</sup>

In the course of this development, which aims, generally speaking, to broaden the autonomy of the Länder, substitutive powers replace instructions. They are less hierarchical, more indirect and usually a means for extraordinary cases. This explains why Austrian Länder have not objected to the creation of substitutive powers. It should, in addition, be pointed out that the German experiences as regards the (non-) exercise of substitutive action in practice are well-known in Austria. The Länder obviously expect that substitutive action as an *ultima ratio* means will remain hypothetical.

### 3.2. Germany as example: some similarities and differences

The knowledge of the German federal and European experience and its perception<sup>383</sup> are an illustration of the influence that German developments in this field have in Austria. A good example is the adoption (or 'reception') of the German *Länder-participation-procedure*

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<sup>381</sup>Art 137 B-VG: The Constitutional Court renders judgement concerning pecuniary legal claims upon the Bund, the Länder, the districts, communes and associations of communes which cannot be settled either by means of the ordinary judicial process nor by a ruling of an administrative authority.

<sup>382</sup>Pizzorusso, *Law in the making*, 139.

<sup>383</sup>Austrian Land representatives traditionally have close connections with their German counterparts, either in multilateral cooperation-structures (ARGE ALP, ALPE-ADRIA) or in bilateral contacts. For an overview of these relations, see: *Pernthaler* (Hrsg.), *Außenpolitik der Gliedstaaten und Regionen*, Wien: Braumüller, 1991; For similarities and differences in the Austrian and German constitutional structure of federalism, see: *Weber*, *Kriterien des Bundesstaates. Eine systematische, historische und rechtsvergleichende Untersuchung der Bundesstaatlichkeit der Schweiz, der Bundesrepublik Deutschland und Österreich*, Wien: Braumüller, 1980

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(*Länderbeteiligungsverfahren*) of 1986<sup>384</sup> in the 1992 amendment of the Austrian Federal-Constitutional Law (Art 10, Sections 4, 5, 6 B-VG). As in the German solution of 1986 the *Bund* was obliged to inform the *Länder* immediately about any project in the framework of European Integration that concerned either matters of their independent domain or matters that would be of other relevant interest to them. The *Länder*, on the other hand, were given the right to make a statement on this within a reasonable time, which would bind the *Bund* in negotiations and voting if concerning a matter where the *Länder* have the competence to legislate. A deviation from such a statement must be justified and is only admissible where there are compelling foreign and integration policy reasons. This solution is, however, much less developed than the participation-model now embodied in Art 23 of the German Basic Law.

The Austrian *Länder*-participation-procedure of 1992 enshrined in Article 10, Section 4 to 6 B-VG (with B-VG Novelle 1994 this two sections were transferred to Art 23d Section 1 and 2 B-VG<sup>385</sup>) is to be put into concrete forms by an agreement between the *Bund* and the *Länder* according to Article 15a B-VG. This agreement (BGBl 1992/775) requires that the *Länder*'s statement or opinion must be made with unanimity<sup>386</sup>. It also states that the *Länder* should give this statement via the so-called 'Integration Conference of the *Länder*' (*Integrationskonferenz der Länder*, in the following: IKL). In a second agreement between the *Länder* of March 12, 1992 (Wiener LGBl 1992/29) it was stated that the participants of the IKL are the *Land* governors (with the right to vote) and the Presidents of the *Land* parliaments (with the right to attend sessions and to speak but not to vote). The presidency of the Federal Council (*Bundesrat*) may also attend sessions, but without the right to vote.

In fact, the IKL is the nucleus of the existing *Conference of Land governors* (*Landeshauptmännerkonferenz*) plus representatives of the *Land* parliaments and the Federal Council. This Conference, which constitutes an informal horizontal cooperation and coordination between the *Land* governors (that according to Article 105, Section 1 B-VG represent the *Länder* outwardly<sup>387</sup>), has - in spite of its political importance - been little dealt with in the doctrine<sup>388</sup>. The federal-state reform project 1994 wanted to enshrine the LHK in Article 105, Section 2 B-VG new.

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<sup>384</sup>Art 2 dt Gesetz vom 19.12.1986 zur Einheitlichen Europäischen Akte vom 28. Februar 1986, dt BGBl 1986 II, 1102; For an overview of *Länder* participation in Germany in EC related decision-making up to 1986, see: Hrbek, *The German Länder and the European Community - Towards a Real Federalism?*, in: Hrbek/Thaysen(Hrsg.), *Die Deutschen Länder und die EG*, 223ff.

<sup>385</sup>see Appendix III.

<sup>386</sup>Unanimity exists when 5 *Länder* vote in favour and no *Land* against (Art 3, Nr 3 Wiener LGBl 1992/29). The IKL was constituted on June 21, 1993. The routine work is to be done by the *Verbindungsstelle der Bundesländer* (liaison office of the *Länder*), which also works as the secretariate of the Conference of *Land* governors.

<sup>387</sup>It should be noted that, in addition to this monopoly in 'foreign affairs', its de facto governmental power is very strong given its position as 'personnel manager' and its power in financial matters.

<sup>388</sup>Compare but Morass, *Regionale Interessen auf dem Weg in die Europäische Union*, 239ff with references.

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Without going into details the difference in the participation-models (Austria: via IKL; Germany: via Bundesrat<sup>389</sup>) may be explained by the fact that the Austrian Bundesrat is not only an institutionally weak body<sup>390</sup> but has never become a real representative of regional interests<sup>391</sup>. It was thus not very surprising that such a 'bundled articulation of interests' *praeter Bundesrat* was set up to deal with questions of European integration that were perceived as vital for the interests of the Austrian Länder. This model was understood as conceivable<sup>392</sup> (given the constitutional reality) and as permissible from a constitutional point of view as well. Also without the laying down of the *Conference of the Land governors* (LHK) in the Constitution (Art 105[2] B-VG new) yet no doubts about the constitutional admissibility of this participation-model shall remain. The *Austrian Länder-participation model* and the creation of possibility to send a representative of the Austrian Länder to the Council (Art 23 d, Section 3 B-VG, B-VG Novelle 1994<sup>393</sup>) demonstrate that the Austrian *Länder* dispose *de facto* of a much higher degree of bargaining capacity and political influence than a purely constitutional analysis would suggest. We should thus be aware that the formal constitutional structures are not the main way in which Länder interests are articulated and brought to bear in the decision-making process<sup>394</sup>. The role of the LHK is certainly an outstanding example for this assessment.

As far as the participation of the legislatures of the *Länder* (Landtage) is concerned, the attendance of the Land parliaments' presidents at the IKL without the right to vote is not the primary channel of interest representation<sup>395</sup>. First, because the President of the Land parliaments are (nearly always) members of the same party as the Land governor and, second, because other (formal) participation-models do exist.

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<sup>389</sup>For the differences between the Austrian and the German Federal Council see, for example: Esterbauer, *Stellung und Reform des Bundesrates in der Bundesrepublik und in Österreich*, BayVBl 1980, 225ff.

<sup>390</sup>Walter/Mayer, *Grundriß des österreichischen Bundesverfassungsrechts*, Rndz 413; According to Ermacora the Federal Council 'would be of little importance in the constitutional reality'. - Ermacora, *Österreichische Verfassungslehre*, Wien: 1970; Luther, *Bund-Länder Beziehungen: Formal- und Realverfassung*, in: Dachs et al, *Handbuch des politischen Systems Österreichs*, 818ff

<sup>391</sup>The basic tendency towards 'party-political fractionating' in the Bundesrat is almost an cliché in the Austrian literature. See: Adamowich/Funk, *Österreichisches Verfassungsrecht*, 127; This tendency has increased in the Great Coalition between the SPÖ and the ÖVP: In the coalition-treaty of December 17, 1990 they were obliged to make sure that their parliamentary parties in the Nationalrat and the Bundesrat(!) will vote unanimously.- see point 4 of the coalition treaty in: Kohl/Ofner/Stirnemann, *Öst. Jahrbuch für Politik* 1990, 203ff; The dominance of the national party line over 'regional loyalties' within a second chamber is thus particularly evident in the Austrian case.

<sup>392</sup>See the study of Pernthaler, *Das Länderbeteiligungsverfahren an der Europäischen Integration*, in particular p 78f.

<sup>393</sup>Compare Article 23, Section 6 dt GG, see Appendix I and III.

<sup>394</sup>In this sense: Luther, *Bund-Länder Beziehungen: Formal- und Realverfassung*, in: Dachs et al (Hrsg.), *Handbuch des politischen Systems Österreichs*, 821 f; Morass, *Regionale Interessen auf dem Weg in die Europäische Union*.

<sup>395</sup>Compare only the surveys of Morass. - Morass, *Regionale Interessen auf dem Weg in die Europäische Union*, 246ff



The Styrian model may serve as an example: the Landtag elects a Committee for European Integration. The Land government is obliged to inform the Committee immediately about all projects in the framework of European integration if they concern matters where the Land has the competence in legislation. A statement of the Committee binds the Land government and thus the Land governor in the IKL. For a deviation from this statement - because of compelling integration policy reasons - a written motivation must be given. In addition, the Land government has to give the Land parliament a written report about the state of European integration every quarter.<sup>396</sup> Similar procedures were installed in Salzburg, Tyrol and Upper Austria<sup>397</sup> on the level of the Land-Constitutional Law and in the other Länder on the basis of Land government decisions<sup>398</sup>. It is obvious that the model described above is a repetition of the Länder participation model for the on the federal level. It is thus also a copy of the German model of 1986, that - in an adapted version - was applied twice in Austria (i.e. on the national and on the regional level).

The Austrian Länder have often claimed compensation in the course of European Integration<sup>399</sup>. It has even been argued that the participation-model for the Austrian Länder would be a compensation<sup>400</sup> for their duty to implement European law (as it is embodied in Article 23d, Section 5 B-VG). However, it remains to be seen if this model, composed of German elements, (that have in the meantime been replaced in Germany by new ones) and Austrian structures can, in practice, work efficiently or if the result is only a 'federalism of complications'<sup>401</sup>.

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<sup>396</sup>Land constitutional law of June 23, 1992 amending the Land-Constitutional Law 1960 (Styrian LGBl 1992/47).

<sup>397</sup>Salzburger Land constitutional law of December 12, 1992 (Blg 166 Sten Prot Salzburger LT Sess 5 GP X); Tiroler Land constitutional law (Tiroler LGBl 1993/17); Upper Austrian Land constitutional law of December 3, 1993 (Oberösterreichisches LGBl 1994/7).

<sup>398</sup>Letter from Univ.-Prof. *Wielinger*, chief of the legal department of the Styrian Land government, April 7, 1994 to the author.

<sup>399</sup>E.G.: *Novak*, Europäische Neugestaltung und Verfassungsautonomie der Länder, 5; *Schreiner*, Die Mitwirkung der Länder im Zuge der EG-Integration in: *Kohl/Ofner/Stirnemann*, Österreichisches Jahrbuch für Politik 1992, 184; *Renner-Loquenz*, Einbindung der österreichischen Bundesländer in den europäischen Integrationsprozeß in: *Ginther/Isak/Posch*, Recht und Politik in einem größeren Europa, 129, 131.

<sup>400</sup>*Staudigl*, Zur Rolle der österreichischen Länder im europäischen Integrationsprozeß, *Austrian Journal of Public International Law* 1993, 51.

<sup>401</sup>*Schäffer*, Europa und die österreichische Bundesstaatlichkeit, *DÖV* 1994, 193.

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### 3.3. The Bund's substitutive competence in the framework of European Integration: Article 23d, Section 5 B-VG

As a 'first step' of European Integration that found its expression in the Austrian Constitution, the 1992 amendment<sup>402</sup> enshrined a duty of the Länder to implement European law. Given that on October 22, 1991 the treaty on the EEA was concluded (it entered into force on January 1, 1993) and that the negotiations about the joining of the European Union officially started in spring 1993 the provision referred to European Integration<sup>403</sup> in general.

With the 1994 amendment of the B-VG (BGBl 1994/1013) Article 16, Section 6 was transferred to Article 23d, Section 5 B-VG.

The Länder are obliged to take measures in their independent domain, which become necessary to implement acts within the framework of European Integration; if a Land is not compliant with this obligation timely and this is declared by a court in the framework of the European Union [former version: a court within the framework of European Integration] vis-à-vis Austria, the Bund shall become competent for this measures, in particular the required enactment. A measure taken by the Bund under this provision, in particular an enactment and a regulation, loses its force when the Land takes the necessary measure.

The provision finds its parallel in section 4 of Article 16 B-VG that concerns the implementation of international treaties (*Staatsverträge*) by the Länder. While the *obligation ex constitution* to implementation measures by regional authorities seems to be useful as regards international treaties, it is debatable if this is not superfluous in the context of European Integration, because all (competent) state organs have, by virtue of Community law, the duty to implement European acts<sup>404</sup>. It is, however, the basis for a substitutive action of the Bund in the case of non-compliance of the responsible Land authority.

The 1988 amendment<sup>405</sup> allowed the Länder to conclude international treaties with adjacent states or regions in the areas where they have the competence in legislation (Art 16[1] B-VG). Simultaneously, the right of veto and the right to demand from the Land the termination of such a treaty was reserved to the Bund. If a Land does not comply with a demand for termination, the right to terminate the treaty would devolve to the Bund<sup>406</sup>. This case thus offers a sort of substitutive action, although with effect on the international plane.

Article 23d, section 5 B-VG presupposes that the state organisation, particularly the federal structure and the vertical division of competences, is left 'untouched' by Community

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<sup>402</sup>Federal constitutional law June 5, 1992 amending the Federal-Constitutional Law (BGBl 1992/276).

<sup>403</sup>This was the first time that the term '*European Integration*' was embodied in an Austrian Constitution.

<sup>404</sup>See my argumentation in Chapter I. 3.3.

<sup>405</sup>Federal constitutional law November 29, 1988 amending the Federal-Constitutional Law (BGBl 1988/685).

<sup>406</sup>It is beyond the scope of this paper to examine the question of whether a termination by the Bund is admissible under international law, given that the parties of the treaty are a Land and an adjacent state or region.





law. The implementation of European law thus follows the same rules as the implementation of domestic law. If acts at the European level require an *implementation via legislation* it is the '*competence-articles*' of the Federal-Constitutional Law that determine the responsible authority (Bund or Land).

If Community acts are directly applicable it is necessary to ascertain which level would be competent if this matter was to be enacted on the national level. In the case of a *Land's* competence in legislation, the *Land* would also be responsible for individual administrative acts (notwithstanding the competence of independent administrative tribunals to decide in the last instance). If the *Bund* is competent for the matter in legislation we have to distinguish: it may be, first, a case of direct federal administration (see Article 10[1] B-VG), or, second, a case of indirect federal administration (with the right of the Bund to issue instructions). The Bund has thus at his disposal a right to issue instructions as well as to act in substitution. The indirect federal administration as well as the Bund's right to issue in this area should have been abolished by the federal-state reform. This change is likely to remain on the agenda, given also that the existence of substitutive powers is somewhat inconsistent with the perdurance of the right to issue instructions.

Article 23d[5] B-VG uses the word '*measures*' three times. This is a reference to Article 5 Ec-Treaty and should therefore also be interpreted in the sense of 'all appropriate measures, whether general or particular'. Article 23d[5] B-VG obliges the *Land* authorities to take all legislative and administrative measures that are necessary to ensure the fulfilment of obligations within the framework of the European Union (Article 16, Section 6 B-VG had referred to the EEA and the EU). The explicit nomination of laws and regulations further on in Article 23d[5] B-VG does by no means exclude individual administrative acts.

Article 23d[5] B-VG entitles the *Bund*, on the other hand, not only to substitutive laws and regulations but also to substitutive administrative acts.

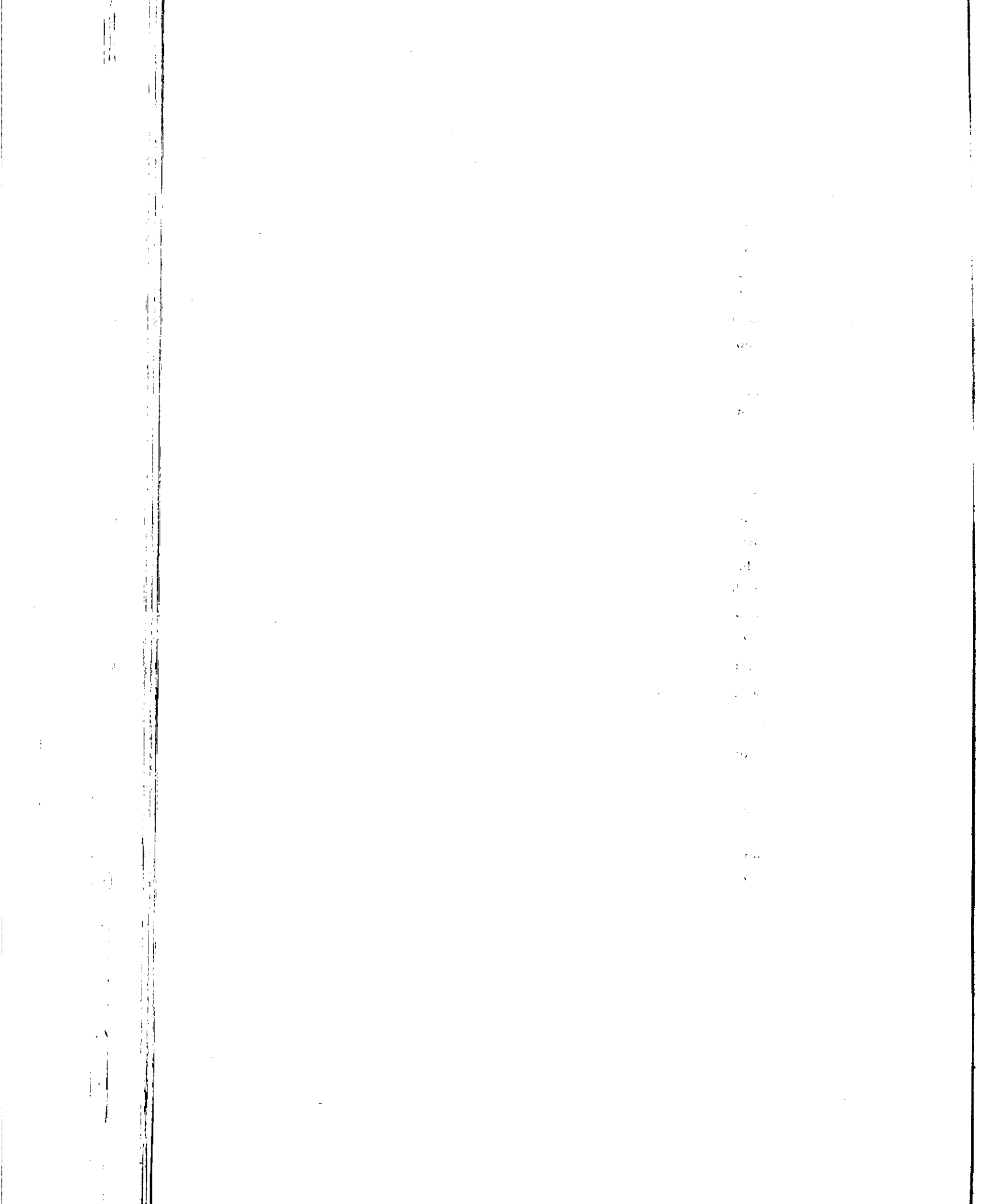
The exercise of the substitutive competence must meet the following two conditions:

- a. an obligation within the framework of European Integration is not fulfilled because of dormancy or insufficient measures of a *Land's* authority
- b. this infringement of European law is declared by the ECJ

If these two requirements are fulfilled, the competence for the appropriate general or particular measure automatically devolves to the *Bund*. No additional demand to take measures and no declaration of the competent minister (as foreseen in Article 103 B-VG new) is necessary.

Every substitutive action of the Bund will lose its force automatically when the *Land* takes the necessary measure. It is thus up to the *Land* to act or to leave the measures taken by the *Bund* in force. Especially in the case of individual administrative acts it will be more convenient to leave the substitutive measure in force because of unequivocal administration of the law.

The requirement of a declaratory judgement of a court in the framework of the European Union and the temporary effect of the substitutive action underline its character of an *ultima ratio* means. The possibility of a *Land* to end the force of the substitutive measure by taking the measure required by European Integration makes an application by a *Land* before the



Constitutional Court in order to declare the substitutive action unconstitutionally (Art 140[1] B-VG for laws; Art 139[1] B-VG for regulations) superfluous. The replacement of hierarchical means, the non-compliance of which might (in theory) lead to an impeachment that was envisaged by the federal-state-reform, with temporary substitutive means would have undoubtedly been an institutional step forward in the development of Austrian federalism. The creation of Article 16[6] B-VG that happened *quasi en passant*<sup>407</sup> in 1992 has not caused preoccupation of the Länder<sup>408</sup> because it could be interpreted as a step towards the right direction. Given the experiences with sanctions for the non-compliance with instructions in the framework of *indirect federal administration* it seemed also likely that 'sanctions' (in the form of a substitutive action) in the framework of indirect European administration will be avoided. It can thus be assumed that Article 23d[5] B-VG will not play an important role either in the relationship between Bund and Länder or the acceleration of the implementation of European law. The fact that a substitutive action can take place only after a declaratory judgement of the ECJ certainly does not allow it to become a means for improving the implementation performance. Article 23d[5] B-VG respects the autonomy of the Länder as regards the implementation of European law; it cannot, however, by virtue of its concrete content and the constitutional reality become a relevant factor in the implementation process.

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<sup>407</sup>Compare the supplements: 372 Blg Sten Prot NR GP XVIII; In the report of the Parliamentary Committee for Constitutional Questions the provision in question was not even discussed: 470 Blg Sten Prot NR GP XVIII.

<sup>408</sup>Letter from HR Dr.Gerhard Wielinger, chief of the legal service of the Styrian government, to the author, March 1, 1994; The same is true for the German Länder.- Letter from G.Matschiner, chief of the state chancellory Saarland, to the author, June 30, 1994.



### III. Conclusions

'Re-federalisation' - or in the case of Italy even 'federalisation' - is a topic perceived as *en vogue* in all the three countries examined in this study. The political debate as well as the juridical analysis have focused primarily on technical structures. Formal participation-structures for sub-national units at the domestic decision-making process in European affairs, a shift of competences to the regions and the replacement of hierarchical instruments with more indirect means are but one dimension of this process. European integration is certainly not the only, and not even the predominant factor that has led to this situation of 'creative tension'<sup>409</sup>, which could be used in favour of claims for 'federalisation'. Times of 'crisis' have always allowed either regional or national actors to take advantage of and to change the institutional weights in this relationship, that per definition can never be static. Any research in this field has to face more complex problems due to the fact that "[...] it is no longer simply a matter of whether federalism makes a difference but rather how and how well it works"<sup>410</sup>. Hence it is absolutely necessary to consider the constitutional reality and the dominant patterns of the behaviour of the actors (elites) as another dimension of systems with different levels of government. According to the classical definition of *Wheare*, in federal systems the powers are divided "[...] so that the general and regional governments are each, within a sphere, coordinate and independent"<sup>411</sup>. European integration enlarges the coordinative sphere. However, the model of the nation state characterised by external sovereignty and internal hierarchical authority<sup>412</sup> is more a legal fiction than a reality. In the framework of the coordinative sphere (international, transnational and regional), networks and an interlocking of policies and politics play a more and more important role. It is against this background that substitutive powers must be evaluated.

In Germany as well as in Austria the regions are entrusted with a broad part of the implementation of European law. In Italy their role in this respect is far less relevant and the recent developments make every assesment of their future part in the implementation process very difficult. The European level does not interfere in the internal constitutional system of the Member States, they remain free to allocate areas of internal legal competence. All competent state organs are bound by European law to take all appropriate measures, whether general or particular to ensure the fulfilment of obligations of the European Community Treaty or resulting from actions taken by the institutions of the Community. Additional domestic provisions that oblige state organs in general or regional authorities in particular to carry out implementation activities are admissible if they refer to European integration and do not

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<sup>409</sup>Spinelli, *The European Adventure. Tasks for the Enlarged Community*, London: 1972, 15.

<sup>410</sup>Bakvis/Chandler, *Federalism and Comparative Analysis*, in: *Bakvis/Chandler, Federalism and the Role of the State*, 4.

<sup>411</sup>Wheare, *Federal Government*, 11.

<sup>412</sup>Scharpf, *Versuch über Demokratie in Verhandlungssystemen*, Max-Planck-Institut für Gesellschaftsforschung, Köln Discussion Paper 92/9, 5.



disguise the European 'character' of the implementation obligation. They must, however, have a primarily 'symbolic' value and be - if ever - functional of secondary importance. The (additional) obligation arising of national (constitutional) law must be perceived mainly as a theoretical background for the concept of substitutive powers.

The role of regions as key actors for the effectiveness of European law is underpinned by the notions of implementation theory. The importance of the implementation phase was also perceived by the Commission: 'Success depends upon two things. It depends upon political will and on the ability to translate that political will into practical achievement.'<sup>413</sup> Substitutive powers are a national instrument to ensure implementation of European law. Their utilisation will thus be primarily determined by the relationship between the national and the regional level, and not by 'necessities of European Integration'. The (short) legal analyses of substitutive powers have assumed that the *trias* 'monitoring-evaluation-sanction' would be of relevant influence on the implementation performance of the sub-national units (thus using a 'top-down approach'). According to these concepts substitutive action of the central authorities would also be a kind of sanction. These notions, however, presuppose that the state is able to gather sufficient information about the implementation performance and has instruments at its disposal that are really idoneus to influence the actions of the sub-national entities. In addition, they implicitly argue that the state is (more) willing to bring the necessities of European integration to the fore than its regions and is ready to accept political repercussions on the domestic level, namely a political conflict with the regions.

At the same time substitutive powers were understood or created as only a resort of the last instance. First, this makes the invoking of a substitutive competence vis-à-vis regions - even in theory - rare. Similarly, substitutive powers become a weak if not superfluous instrument for improving compliance if compared with comunitarian instruments (but even the procedure of Article 169ff EC-Treaty has often been merely declaratory) or individual enforcement (Francovich, direct effect). Substitutive powers, particularly when of temporary effect, are not only an empty threat, but often not even a threat. The more this assessment is true in the '*Realverfassung*' of Austria and Germany. The substantial administrative resources are in the hands of the *Länder* and, maybe more important, the 'policystyle' in the *Bund-Länder* relationship is dominated by consensual and cooperative patterns. In addition, the *Länder*, namely the *Land* governments, have associated - not least in the framework of European Integration - so that a (thinkable) policy of '*divide et impera*' is made impossible. This system might be an example for the bottom-up approach, that is characterised by the "strategic interaction among multiple actors in a policy network"<sup>414</sup>.

Substitutive powers are a domestic instrument and are determined by the domestic context. If substitutive action were ever invoked, it would easily be seen as a sanction against an 'awkward' region. As observed in the case of instructions not obeyed by *Land* governors in

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<sup>413</sup>Commission, Second report to the Council and the European Parliament on the implementation of the Commission's White Paper on completing the internal market, COM (87) 203 final, 24.

<sup>414</sup>Sabatier, Top-Down and Bottom-Up Approaches to Implementation Research: a Critical Analysis and Suggested Synthesis, *Journal of Public Policy* 1986, 33.





Austria, the conflict would be defined in terms of federalism, and maybe even anti-centralism (anti-Vienna and anti-Brussels), which would substantially increase the support for the *Land* governor within its territory<sup>415</sup>. Consequently, substitutive powers represent a classical 'no-win' situation for the governments in both Austria and Germany. This, albeit hypothetical, scenario illustrates the possible abuse of non-compliance and substitutive action for party disputes. The German experience shows that in such a context substitutive competences must necessarily remain dead law. In the federal framework the shift from instructions that could (theoretically) lead to an impeachment [A] to temporary substitutive action, that is understood only as ultima ratio means, could certainly be envisaged as a step forward towards more also formal autonomy.

This study has further tried to show that European integration has led to a system of responsibilities that is much more complex than the advocates of a substitutive power of the state vis-à-vis regions have claimed. First, a state upon which a lump sum and a penalty payment has been imposed under Article 171[2] EC-Treaty, because of non-compliance of one of its regions with a ECJ-judgement, can have this payment refunded (via national courts). Second, *Länder* in Germany and Austria as legal entities are as a consequence of the Francovich judgement liable for the non-transposition of a directive. In the absence of any Community legislation, it is in accordance with the rules of national liability that the reparation must be made. Given that the provisions regarding public liability in Austria and Germany lack a liability for 'legislative default' I have stressed here the imperative of an amendment. Third, we have to remember that individuals can rely upon directly applicable directives vis-à-vis 'all organs of the administration'<sup>416</sup>, hence also vis-à-vis regions. Responsibility is shared one than resting exclusively upon the state (in a narrow sense).

Contrary to Germany and Austria, in Italy hierarchical lines continue to exist simultaneously with a substitutive competence. Here there is a similar outcome, namely the non-invoking of the substitutive power, as a result of a different system. In theory it seems unlikely that a substitutive power will be invoked considering that the central state disposes of hierarchical instruments. It is true that in the relationship state-regions political bargaining took place<sup>417</sup>, but this did not lead to a consensual form of cooperation that could be compared with the patterns in the two federal states compared in this paper. The 'fashionable watchword of political discourse changed in the 1980s from 'participation' to 'decisionismo'<sup>418</sup>. In addition, Italian Regions were not able to associate vis-à-vis the centre

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<sup>415</sup>See: Müller, Austrian Governmental Institutions: Do They Matter, WEP 1992, 125.

<sup>416</sup>ECJ Case 103/88 Fratelli Costanzo Spa v Comune di Milano, ECR 1989, 1839f.

<sup>417</sup>Leonardi/Nanetti/Putnam, Italy - Territorial Politics in the Post-War Years: The Case of Regional Reform, WEP 1987/4, 105f; In fact, bargaining, compromise and the sharing of powers - that were envisaged as features of the Italian political system behind the apparent conflictuality and disorder - have been concentrated primarily on the national level. Compare the study of *La Palombara*, Democracy Italian Style, New Haven/London: Yale University Press, 1987; In addition, it has been stressed that 'every aspect of local government has been subordinated to party interests'. - Spotts/Wieser, Italy. A Difficult Democracy, Cambridge: University Press, 1986, 229.

<sup>418</sup>Hine, Governing Italy. The Politics of Bargained Pluralism, Oxford: Clarendon Press, 1993, 266.



due to their fundamental divisions, so that the concept '*divide et impera*' could have effect. It is not likely that the endemic conflictuality with its litigation before the Constitutional Court will be replaced in the near future. It seems either less if we consider the degree to which 'consociativismo' and cooperative patterns in public policy are discredited in Italy today. Predictions, however, are difficult at this moment. However, the Italian performance in the implementation of European law might be conceptualised using a 'top-down approach'. The systematic failure in the implementation-process must also be understood from this viewpoint. In fact, a recent example shows that Italy is able to fulfil its Community obligations if the political will exists: Council directive 93/98/EEC<sup>419</sup> harmonised the term of protection of copyright and certain related rights; in particular, it extended the period of authors' rights to 70 years after his/her death. Member States are required to transpose the directive before July 1, 1995. On June 30, 1994 (i.e. one year before[!] the limit set up by the Council) decree n. 421 was enacted, which concerned 'emergency financial measures in publishing and broadcasting'. By article 7 of this decree the duration of authors' rights was extended to a period of 70 years after his/her death<sup>420</sup>. However, European integration will more often demand measures that coincide less well with certain aims of the government. Problems concerning the implementation-stage of European law seem not to be caused primarily at the regional level, as in general it must be converted into a state law before regions can implement it. Regions might perhaps be used by national politics as a additional tool for the slowing down of unwelcome European laws. It therefore does not seem to be out of place to argue that in Italy the demands of a regional structure and the necessities of European integration are 'concealed' in favour of 'national interests', and thus at the price of regional autonomy and European integration. For the relationship state-regions as for the system as a whole we must be aware that "[...] it is also the sum of attitudes and values of its citizens and its political class, and these are not easily shifted by the stroke of a reforming pen"<sup>421</sup>.

Substitutive competences are not a suitable instrument for concealing the demands of federalism with the necessities of European integration. They are a fiction: fiction that finally the needs of European integration will be brought to the fore; a fiction that regional autonomy will be best preserved by temporary 'substitutive' means of the national level. Like all fictions they are not undesired. They are idoneous to cover theoretical lacks both in the understanding of European Integration and in the process of adapting national constitutions to European Integration.

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<sup>419</sup>Council Directive 93/98/EEC of 29 October 1993, OJ No L 290/9.

<sup>420</sup>FAZ 11.8.1994, Nr 185, 23.

<sup>421</sup>Hine, *Governing Italy. The Politics of Bargained Pluralism*, Oxford: Clarendon Press, 1993, 10.

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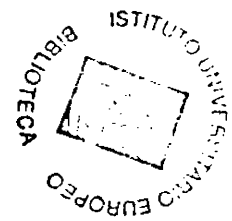


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## Appendix I: Legal Materials - Germany

### I. Art. 23 GG

[1] Zur Verwirklichung eines vereinten Europas wirkt die Bundesrepublik Deutschland bei der Entwicklung der Europäischen Union mit, die demokratischen, rechtsstaatlichen, sozialen und föderativen Grundsätzen verpflichtet ist und einen diesem Grundgesetz im wesentlichen vergleichbaren Grundrechtsschutz gewährleistet. Der Bund kann hierzu durch Gesetz mit Zustimmung des Bundesrates Hoheitsrechte übertragen. Für die Begründung der Europäischen Union und für Änderungen ihrer vertraglichen Grundlagen, durch die dieses Grundgesetz seinem Inhalt nach geändert oder ergänzt wird oder solche Änderungen oder Ergänzungen ermöglicht werden, gilt Art. 79 Abs. 2 und 3.

[2] In Angelegenheiten der Europäischen Union wirken der Bundestag und durch den Bundesrat die Länder mit. Die Bundesregierung hat den Bundestag und den Bundesrat umfassend und zum frühestmöglichen Zeitpunkt zu unterrichten.

[3] Die Bundesregierung gibt dem Bundestag Gelegenheit zur Stellungnahme vor ihrer Mitwirkung an Rechtssetzungsakten der Europäischen Union. Die Bundesregierung berücksichtigt die Stellungnahmen des Bundestages bei den Verhandlungen. Das nähere regelt ein Gesetz.

[4] Der Bundesrat ist an der Willensbildung des Bundes zu beteiligen, soweit er an einer entsprechenden innerstaatlichen Massnahme mitzuwirken hätte oder soweit die Länder innerstaatlich zuständig wären.

[5] Soweit in einem Bereich ausschliesslicher Zuständigkeiten des Bundes Interessen der Länder berührt sind oder soweit im übrigen der Bund das Recht zur Gesetzgebung berücksichtigt die Bundesregierung die Stellungnahme des Bundesrates. Wenn im Schwerpunkt Gesetzgebungsbefugnisse der Länder, die Einrichtung ihrer Behörden oder ihre Verwaltungsverfahren betroffen sind, ist bei der Willensbildung des Bundes insoweit die Auffassung des Bundesrates massgeblich zu berücksichtigen; dabei ist die gesamtstaatliche Verantwortung des Bundes zu wahren. In Angelegenheiten, die zu Ausgaben erhöhungen oder Einnahmevermindernungen für den Bund führen können, ist die Zustimmung der Bundesregierung erforderlich.

[6] Wenn im Schwerpunkt ausschliessliche Gesetzgebungsbefugnisse der Länder betroffen sind, soll die Wahrnehmung der Rechte, die der Bundesrepublik Deutschland als Mitgliedstaat der Europäischen Union zustehen, vom Bund auf einen vom Bundesrat benannten Vertreter der Länder übertragen werden. Die Wahrnehmung der Rechte erfolgt unter Beteiligung und in Abstimmung mit der Bundesregierung; dabei ist die gesamtstaatliche Verantwortung des Bundes zu wahren.

Das Nähere zu den Absätzen 4 bis 6 regelt ein Gesetz, das der Zustimmung des Bundesrates bedarf.



## II. Gesetz über die Zusammenarbeit von Bundesregierung und Deutschem Bundestag in Angelegenheiten der Europäischen Union vom 12. März 1993 (EUZBTG; BGBl. 1993 I S. 311f.)

- § 1 In Angelegenheiten der Europäischen Union wirkt der Bundestag an der Willensbildung des Bundes mit.
- § 2 Der Bundestag bestellt einen Ausschuss für Angelegenheiten der Europäischen Union. der Bundestag kann den Ausschuss ermächtigen, für ihn Stellungnahmen abzugeben.
- § 3 Die Bundesregierung unterrichtet den Bundestag umfassend und zum frühestmöglichen Zeitpunkt über alle Vorhaben im Rahmen der Europäischen Union, die für die Bundesrepublik Deutschland von Interesse sein könnten.
- § 4 Die Bundesregierung übersendet dem Bundestag insbesondere die Entwürfe von Richtlinien und Verordnungen der Europäischen Union und unterrichtet den Bundestag zugleich über den wesentlichen Inhalt und die Zielsetzung, über das beim Erlass des geplanten Rechtssetzungsakts innerhalb der Europäischen Union anzuwendende Verfahren und den voraussichtlichen Zeitpunkt der Befassung des Rates, insbesondere den voraussichtlichen Zeitpunkt der Beschlussfassung im Rat. Sie unterrichtet den Bundestag unverzüglich über ihre Willensbildung, über den Verlauf der Beratungen, über die Stellungnahme des Europäischen Parlaments und der Europäischen Kommission, über die Stellungnahmen der anderen Mitgliedstaaten sowie über die getroffenen Entscheidungen.
- § 5 Die Bundesregierung gibt vor ihrer Zustimmung zu Rechtssetzungsakten der Europäischen Union dem Bundestag Gelegenheit zur Stellungnahme. Die Frist zur Stellungnahme muss so bemessen sein, dass der Bundestag ausreichend Gelegenheit hat, sich mit der Vorlage zu befassen. Die Bundesregierung legt die Stellungnahme ihren Verhandlungen zugrunde.
- § 6 Für den Bereich des Artikels 235 EWG-Vertrag gelten die Vorschriften dieses Gesetzes bereits vor Gründung der Europäischen Union entsprechend.
- § 7 Dieses Gesetz tritt mit dem Tage der Gründung der Europäischen Union in Kraft.<sup>1</sup> Dieser Tag ist im Bundesgesetzblatt bekanntzugeben. Abweichend von Satz 1 tritt § 6 am 1. Januar 1993 in Kraft.

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<sup>1</sup> 1.11.1993





### III. Gesetz über die Zusammenarbeit von Bund und Ländern in Angelegenheiten der Europäischen Union vom 12. März 1993 (EUZBLG, BGBl. 1993 I S. 313ff.)

- § 1 In Angelegenheiten der Europäischen Union wirken die Länder durch den Bundesrat mit.
- § 2 Die Bundesregierung unterrichtet den Bundesrat unbeschadet des Artikels 2 des Gesetzes zu den Verträgen vom 25. März 1957 zur Gründung der Europäischen Wirtschaftsgemeinschaft und der Europäischen Atomgemeinschaft vom 27. Juli 1957 (BGBl. II S. 753) umfassend und zum frühestmöglichen Zeitpunkt über alle Vorhaben im Rahmen der Europäischen Union, die für die Länder von Interesse sein könnten.
- § 3 Vor der Festlegung der Verhandlungsposition zu einem Vorhaben der Europäischen Union gibt die Bundesregierung dem Bundesrat rechtzeitig Gelegenheit zur Stellungnahme binnen angemessener Frist, soweit Interessen der Länder berührt sind.
- § 4 Soweit der Bundesrat an einer entsprechenden innerstaatlichen Massnahme mitzuwirken hätte oder sowie die Länder innerstaatlich zuständig wären, beteiligt die Bundesregierung vom Bundesrat benannte Vertreter der Länder an Beratungen zur Festlegung der Verhandlungsposition zu dem Vorhaben.  
Gegenstand der Beratungen nach Absatz 1 ist auch die Anwendung der §§ 5 und 6 auf das Vorhaben. Dabei ist zwischen Bund und Ländern ein Einvernehmen anzustreben.
- § 5 Soweit in einem Bereich ausschliesslicher Zuständigkeit des Bundes Interessen der Länder berührt sind oder sowie im übrigen der Bund das Recht zur Gesetzgebung hat, berücksichtigt die Bundesregierung die Stellungnahme des Bundesrates bei der Festlegung der Verhandlungsposition zu dem Vorhaben.  
Wenn bei einem Vorhaben im Schwerpunkt Gesetzgebungsbefugnisse der Länder betroffen sind und der Bund kein Recht zur Gesetzgebung hat oder ein Vorhaben im Schwerpunkt die Einrichtung der Behörden der Länder oder ihre Verwaltungsverfahren betrifft, ist insoweit bei Festlegung der Verhandlungsposition durch die Bundesregierung die Stellungnahme des Bundesrates massgeblich zu berücksichtigen; im übrigen gilt Absatz 1. Die gesamtstaatliche Verantwortung des Bundes, einschliesslich aussen-, verteidigungs- und integrationspolitisch zu bewertender Fragen, ist zu wahren. Stimmt die Auffassung der Bundesregierung nicht mit der Stellungnahme des Bundesrates überein, ist ein Einvernehmen anzustreben. Zur Herbeiführung dieses Einvernehmens erfolgt erneute Beratung der Bundesregierung mit Vertretern der Länder. Kommt ein Einvernehmen nicht zustande und bestätigt der Bundesrat daraufhin seine Auffassung mit einem mit zwei Dritteln seiner Stimmen gefassten Beschluss, so ist die Auffassung des Bundesrates massgebend. Die Zustimmung der Bundesregierung ist erforderlich, wenn Entscheidungen zu Ausgabenerhöhungen oder Einnahmeverminderungen für den Bund führen könnten.  
Vor der Zustimmung zu Vorhaben, die auf Art. 235 EWG-Vertrag gestützt werden, stellt die Bundesregierung das Einvernehmen mit dem Bundesrat her, soweit dessen Zustimmung nach innerstaatlichem Recht erforderlich wäre oder soweit die Länder innerstaatlich zuständig wären.
- § 6 Bei einem Vorhaben, bei dem der Bundesrat an einer entsprechenden innerstaatlichen Massnahme mitzuwirken hätte oder bei dem die Länder innerstaatlich zuständig wären oder das sonst wesentliche Interessen der Länder berührt, zieht die Bundesregierung auf Verlangen der Vertreter der Länder zu den Verhandlungen in den Beratungsgremien der Kommission und des Rates hinzu, soweit ihr dies möglich ist. Die Verhandlungsführung liegt bei der Bundesregierung; Vertreter der Länder können mit Zustimmung der Verhandlungsführung Erklärungen abgeben.  
Bei einem Vorhaben, das im Schwerpunkt ausschliessliche Gesetzgebungsbefugnisse der Länder betrifft, soll die Bundesregierung die Verhandlungsführung in den Beratungsgremien der Kommission und des Rates und bei Ratstagungen in der Zusammensetzung der Minister auf einen Vertreter der Länder übertragen. Für diese Ratstagungen kann vom Bundesrat nur ein Mitglied einer Landesregierung im Ministerrang benannt werden. Die Ausübung der Rechte durch den Vertreter der Länder erfolgt unter Teilnahme von und in Abstimmung mit dem Vertreter der Bundesregierung. Die Abstimmung der Verhandlungsposition mit dem Vertreter der Bundesregierung im Hinblick auf eine sich ändernde Verhandlungslage erfolgt entsprechend den für die interne Willensbildung geltenden Regeln und Kriterien.  
Absatz 2 gilt nicht für die Rechte, die der Bundesrepublik Deutschland als Vorsitz im Rat zustehen. Bei der Ausübung dieser Rechte setzt sich die Bundesregierung, soweit Vorhaben im Sinne des Absatzes 2 Satz 1 betroffen sind, mit dem Vertreter der Länder ins Benehmen.  
Auf Tagesordnungspunkte der Ratstagungen, die der Rat ohne Aussprache genehmigt, findet



Absatz 2 keine Anwendung, wenn diese Behandlung mit dem Vertreter der Länder abgestimmt worden ist.

- § 7 Die Bundesregierung macht auf Verlangen des Bundesrates unbeschadet eigener Klagerechte der Länder von dem im Vertrag über die Europäische Union vorgesehenen Klagemöglichkeiten Gebrauch, soweit die Länder durch ein Handeln oder Unterlassen von Organen der Union in Bereichen ihrer Gesetzgebungsbefugnisse betroffen sind und der Bund kein Recht zur Gesetzgebung hat. Dabei ist die gesamtstaatliche Verantwortung des Bundes, einschliesslich aussen-, verteidigungs- und integrationspolitisch zu bewertender Fragen, zu wahren.

Absatz 1 gilt entsprechend, wenn die Bundesregierung im Verfahren vor dem Europäischen Gerichtshof Gelegenheit zur Stellungnahme hat.

Hinsichtlich der Prozessführung vor dem Europäischen Gerichtshof stellt die Bundesregierung in den in den Absätzen 1 und 2 genannten Fällen sowie für Vertragsverletzungsverfahren, in denen die Bundesrepublik Deutschland Partei ist, mit dem Bundesrat Einvernehmen her, soweit Gesetzgebungsbefugnisse der Länder betroffen sind und der Bund kein Recht zur Gesetzgebung hat.

- § 8 Die Länder können unmittelbar zu Einrichtungen der Europäischen Union ständige Verbindungen unterhalten soweit dies zur Erfüllung ihrer staatlichen Befugnisse und Aufgaben nach dem Grundgesetz dient. Die Länderbüros erhalten keinen diplomatischen Status. Stellung und Aufgaben der Ständigen Vertretung in Brüssel als Vertretung der Bundesrepublik Deutschland bei den Europäischen Gemeinschaften gelten uneingeschränkt auch in den Fällen, in denen die Wahrnehmung der Rechte, die der Bundesrepublik Deutschland als Mitgliedstaat der Europäischen Union zustehen, auf einen Vertreter der Länder übertragen wird.

- § 9 Einzelheiten der Unterrichtung und Beteiligung der Länder nach diesem Gesetz bleiben einer Vereinbarung zwischen Bund und Ländern vorbehalten.

- § 10 Bei Vorhaben der Europäischen Union ist das Recht der Gemeinden und Gemeindeverbände zur Regelung der Angelegenheiten der örtlichen Gemeinschaft zu wahren und sind ihre Belange zu schützen.

- § 11 Dieses Gesetz gilt nicht für den Bereich der Gemeinsamen Aussen- und Sicherheitspolitik der Europäischen Union.

- § 12 Dieses Gesetz gilt auch für Vorhaben, die auf Beschlüsse des Rates und der im Rat vereinigten Vertreter der Regierungen der Mitgliedstaaten gerichtet sind.

- § 13 Die in § 9 genannte Vereinbarung kann weitere Fälle vorsehen, in denen die Länder entsprechend diesem Gesetz mitwirken.

- § 14 Die Bundesregierung schlägt dem Rat als Mitglieder des Ausschusses der Regionen und deren Stellvertreter die von den Ländern benannten Vertreter vor. Die Länder regeln ein Beteiligungsverfahren für die Gemeinden und Gemeindeverbände, das sichert, dass diese auf Vorschlag der kommunalen Spitzenverbände mit drei gewählten Vertretern im Regionalausschuss vertreten sind.

- § 15 Artikel 2 des Gesetzes vom 19. Dezember 1986 zur Einheitlichen Europäischen Akte vom 28. Februar (BGBl. II S. 1102) tritt mit Inkrafttreten dieses Gesetzes ausser Kraft.

- § 16 Dieses Gesetz tritt mit dem Tage der Gründung der Europäischen Union in Kraft. Dieser Tag ist im Bundesgesetzesblatt bekanntzugeben. Abweichend von Satz 1 tritt § 5 Abs. 3 am 1. Januar 1993 in Kraft."



#### IV. Vereinbarung zwischen der Bundesregierung und den Regierungen der Länder über die Zusammenarbeit in Angelegenheiten der Europäischen Union in Ausführung von § 9 des Gesetzes über die Zusammenarbeit von Bund und Ländern in Angelegenheiten der Europäischen Union vom 12. März 1993 vom 29. Oktober 1993 (Bundesanzeiger Nr. 226 vom 2. Dezember 1993, S. 10425ff.)

"Bundesregierung und Regierungen der Länder bekennen sich zur Verwirklichung eines vereinten Europas und der Entwicklung der Europäischen Union auf der Grundlage der Verträge über die Gründung der Europäischen Gemeinschaften einschliesslich deren Folgerecht und des Vertrages über die Europäische Union sowie zu den sich daraus ergebenden Informations- und Handlungspflichten in wechselseitigem Treueverhältnis. Sie arbeiten auf der Grundlage von Art. 23 GG und des dazu ergangenen Gesetzes über die Zusammenarbeit von Bund und Ländern in Angelegenheiten der Europäischen Union (EUZBLG) eng und vertrauensvoll zusammen. Zur Durchführung der diese Zusammenarbeit regelnden Bestimmungen vereinbaren sie folgendes:

##### I. Unterrichtung des Bundesrates

1. Die Bundesregierung unterrichtet den Bundesrat laufend und in der Regel schriftlich über alle Vorhaben im Rahmen der Europäischen Union, die für die Länder von Interesse sein könnten. Dies geschieht insbesondere durch Übersendung von der Bundesregierung vorliegenden
  - a) Dokumenten
    - der Kommission und ihrer Dienststellen, soweit sie an den Rat gerichtet oder der Bundesregierung auf sonstige Weise offiziell zugänglich gemacht worden sind;
    - des Europäischen Rates, des Rates, der informellen Ministertreffen und der Ratsgremien.
  - b) Berichten und Mitteilungen von Organen der Europäischen Union über Sitzungen
    - des Europäischen Rates, des Rates und der informellen Ministertreffen;
    - des Ausschusses der Ständigen Vertreter und sonstiger Ausschüsse oder Arbeitsgruppen der Rates;
    - der Beratungsgremien bei der Kommission.
  - c) Berichten der Ständigen Vertretung über
    - Sitzungen des Rates und der Ratsgruppen<sup>2</sup>, der informellen Ministertreffen und des Ausschusses der Ständigen Vertreter;
    - Sitzungen des Europäischen Parlaments und seiner Ausschüsse;
    - Entscheidungen der Kommission, wobei die Empfänger dafür Sorge tragen, dass diese Berichte nur an einen begrenzten Personenkreis in den jeweils zuständigen obersten Landesbehörden weitergeleitet werden.
  - d) Dokumenten und Informationen über förmliche Initiativen, Stellungnahmen und Erläuterungen der Bundesregierung für Organe der Europäischen Union.<sup>3</sup>

Die Unterrichtung bezieht sich auch auf Vorhaben, die auf Beschlüsse der im Rat vereinigten Vertreter der Regierungen der Mitgliedstaaten gerichtet sind.

Im übrigen oder ergänzend erfolgt die Unterrichtung mündlich in ständigen Kontakten.
2. Die Bundesregierung übersendet die Unterlagen dem Bundesrat zum frühestmöglichen Zeitpunkt auf dem kürzesten Weg.
3. Die Ministerien des Bundes und der Länder eröffnen sich untereinander und dem Bundesrat im Rahmen der geltenden Datenschutzvorschriften Zugang zu ressortübergreifenden Datenbanken zu Vorhaben im Rahmen der Europäischen Union. Die Bundesregierung wird sich bemühen, dass EG-Datenbanken, die den Regierungen der Mitgliedstaaten zugänglich sind, auch dem Bundesrat und den Regierungen der Länder zugänglich gemacht werden. Einzelheiten müssen gesondert geregelt werden.

##### II. Vorbereitende Beratungen

1. Das innerhalb der Bundesregierung federführende Bundesressort lädt die Ländervertreter zu Beratungen zur Festlegung der Verhandlungsposition zu Vorhaben ein, soweit der Bundesrat an

<sup>2</sup>Darunter fallen auch Berichte über Sitzungen der Freunde der Präsidentschaft sowie der Antici-Gruppe.

<sup>3</sup>Die Unterrichtung bezieht sich auch auf die Sammelweisung für den Ausschuss der Ständigen Vertreter sowie auf förmliche Initiativen der Regierungen anderer Mitgliedstaaten gegenüber Rat und Kommission, die der Bundesregierung offiziell zugänglich gemacht wurden und die für die Meinungsbildung der Länder von Bedeutung sind.



einer entsprechenden innerstaatlichen Massnahme mitzuwirken hätte oder soweit die Länder innerstaatlich zuständig wären. Dabei soll auch Einvernehmen über die Anwendung von §§ 5 und 6 EUZBLG auf ein Vorhaben angestrebt werden<sup>4</sup>.

2. Bei der Einordnung eines Vorhabens unter die Regelungen des EUZBLG ist auf den konkreten Inhalt der EG-Vorlage abzustellen. Die Zuordnung zur Zuständigkeit des Bundes oder der Länder folgt aus der innerstaatlichen Kompetenzordnung.

Bei Beurteilung der Frage, ob bei einem Vorhaben der Bund im nationalen Bereich das Recht zur Gesetzgebung hat, ist in Fällen der konkurrierenden und der Rahmengesetzgebung auch darauf abzustellen, ob ein Bedürfnis nach bundesgesetzlicher Regelung im Sinne von Art. 72 Abs. 2 GG bestehen würde.

Hinsichtlich des Regelungsschwerpunktes des Vorhabens ist darauf abzustellen, ob eine Materie im Mittelpunkt des Vorhabens steht oder ganz überwiegend Regelungsgegenstand ist. Das ist nicht quantitativ bestimmbar, sondern das Ergebnis einer qualitativen Beurteilung.

3. In den Fällen, in denen innerstaatlich eine Zusammenarbeit von Bund und Ländern vorgesehen ist, ist - unbeschadet der Bestimmungen des EUZBLG im einzelnen - bei Festlegung der Verhandlungsposition - auch auf Gemeinschaftsebene - ein gemeinsames Vorgehen anzustreben<sup>5</sup>.

### III. Stellungnahme des Bundesrates

1. Um die rechtzeitige Abgabe einer Stellungnahme zu ermöglichen, informiert die Bundesregierung den Bundesrat unbeschadet der Unterrichtung nach Teil I dieser Vereinbarung bei allen Vorhaben, die Interessen der Länder berühren, über den zeitlichen Rahmen der Behandlung in den Ratsgremien.

Je nach Verhandlungslage teilt die Bundesregierung dem Bundesrat auch mit, bis zu welchem Zeitpunkt eine Stellungnahme wegen der sich aus dem Verfahrensablauf der Europäischen Union ergebenden zeitlichen Vorgaben noch berücksichtigt werden kann.

2. Der Bundesrat kann seine Stellungnahme im Verlauf der Beratung des Vorhabens in den Gremien der Europäischen Union anpassen und ergänzen. Zu diesem Zweck unterrichtet die Bundesregierung den Bundesrat durch ständige Kontakte - in einer der Sache jeweils angemessenen Form - über wesentliche Änderungen bei diesen Vorhaben.
3. Beschlüsse des Bundesrates sind auch solche, die von der Europakammer des Bundesrates (Art. 52 Abs. 3a GG) abgegeben werden.
4. Stimmt in den Fällen von § 5 Abs. 2 EUZBLG die Auffassung der Bundesregierung nicht mit der Stellungnahme des Bundesrates überein, unterrichtet sie den Bundesrat und lädt unverzüglich die vom Bundesrat benannten Ländervertreter zur erneuten Beratung ein, um möglichst Einvernehmen<sup>6</sup> zu erzielen. Kommt ein Einvernehmen nicht zustande, beschliesst der Bundesrat unverzüglich darüber, ob seine Stellungnahme aufrechterhalten wird.
5. Weicht die Bundesregierung von einer Stellungnahme des Bundesrates ab, so teilt sie auf Verlangen des Bundesrates nach Abschluss eines Vorhabens die massgeblichen Gründe mit.

### IV. Hinzuziehung von Ländervertretern zu Verhandlungen in Gremien der Europäischen Union

1. Werden in Gremien des Rates oder der Kommission Vorhaben behandelt, zu denen dem Bundesrat vor Festlegung der Verhandlungsposition Gelegenheit zur Stellungnahme zu geben ist, so unterrichtet die Bundesregierung den Bundesrat unverzüglich über den Ort, den Zeitpunkt und die Beratungsgegenstände der Sitzungen dieser Gremien. Dasselbe gilt soweit möglich für vorbereitende Aktivitäten der Kommission der Europäischen Gemeinschaft wie formelle Anhörungen, Konsultationen und Expertengespräche.
2. Unbeschadet der gesetzlichen Regelungen des § 6 Abs. 1 EUZBLG führen die Bundesregierung und die Regierungen der Länder gemeinsam eine Liste der Beratungsgremien<sup>7</sup> bei Kommission und Rat, in denen Vorhaben behandelt werden, bei denen der Bundesrat an einer entsprechenden innerstaatlichen Massnahme mitzuwirken hätte, bei denen die Länder innerstaatlich zuständig wären

<sup>4</sup>Die Länder weisen darauf hin, dass es sich hier nur um vorläufige Festlegungen handeln kann, die gegebenenfalls unter den Vorbehalt einer Beschlussfassung des Bundesrates zu stellen sind.

<sup>5</sup>Entsprechend wird bei Festlegung der Verhandlungsposition verfahren, wenn der Regelungsschwerpunkt des Vorhabens schwer feststellbar ist.

<sup>6</sup>Die Länder weisen darauf hin, dass das Einvernehmen gegebenenfalls unter den Vorbehalt einer Beschlussfassung des Bundesrates zu stellen ist.

<sup>7</sup>Darunter fallen auch die Gremien nach dem Beschluss des Rates vom 13. Juli 1987 zur Festlegung der Modalitäten für die Ausübung der Kommission übertragenen Durchführungsbefugnisse sowie der Koordinierungsausschuss nach K 4 EU-V. Beim Ausschuss der Ständigen Vertreter sowie beim Sonderausschuss Landwirtschaft werden die Länder durch Teilnahme von Ländervertretern an den Sitzungen zur Vorbereitung der Weisungen beteiligt.





über bei denen wesentliche Interessen der Länder betroffen sind. Diese Liste kann einvernehmlich geändert werden, ohne dass es einer förmlichen Änderung dieser Vereinbarung bedarf.

3. Der Bundesrat benennt der Bundesregierung die Ländervertreter bzw. das die Vertreter entsendende Ressort einer Landesregierung. Für die in der Liste erfassten Gremien kann dies ebenfalls listenmässig für einen bestimmten Zeitraum erfolgen. Werden Ländervertreter im Einzelfall ausserhalb oder in Änderung der listenmässig benannten Vertreter bestellt, teilt dies der Bundesrat vor den Verhandlungen mit.

Die Bundesregierung wird dem Verlangen auf Hinzuziehung mindestens eines Länderververtreters, bei Vorliegen der Voraussetzungen von § 5 Abs. 2 EUZBLG von zwei Länderver Vertretern, entsprechen, soweit ihr das möglich ist.

Die Bundesregierung wird sich im Einzelfall jeweils bemühen, die Hinzuziehung eines Länderververtreters zu ermöglichen.

Nimmt in diesen Fällen des § 6 Abs. 1 EUZBLG kein benannter Ländervertreter teil oder ist noch kein Ländervertreter vom Bundesrat benannt, kann im Einzelfall die Sitzung von einem Vertreter wahrgenommen werden.

4. Über die Hinzuziehung von Länderver Vertretern zu informellen Treffen, soweit im Schwerpunkt ausschliessliche Gesetzgebungsbefugnisse der Länder betroffen sind, verständigen sich bundesregierung und Länder im Einzelfall.
5. Für Ratstagungen in der Zusammensetzung der Minister, bei denen Vorhaben behandelt werden, die im Schwerpunkt ausschliessliche Gesetzgebungsbefugnisse der Länder betreffen, benennt der Bundesrat gem. § 6 Abs. 2 EUZBLG Mitglieder von Landesregierungen im Ministerrat, auf die die Bundesregierung für diese Vorhaben die Verhandlungsführung übertragen soll. Die Länder stellen eine den Anforderungen von Art. 146 EG-V entsprechende Vertretung bei diesen Ratssitzungen sicher. Bei Verhinderung der Ländervertreter nimmt ein Vertreter der Bundesregierung oder der Ständige Vertreter die Verhandlungsführung wahr.
6. Vertreter der Länder sind Mitglieder der deutschen Delegation. Sie nehmen an Delegationsbesprechungen vor Ort teil, die zur Vorbereitung während der Sitzungen durchgeführt werden. Vorausgehende gemeinsame Vorbereitungen, die auch von den Länderver Vertretern angeregt werden können, bleiben unberührt.
7. Die Delegationsleitung liegt bei der Bundesregierung. Sie wird - unbeschadet der Verhandlungsführung zu einzelnen Vorhaben - vom Vertreter der Bundesregierung im Benehmen mit dem Vertreter der Länder wahrgenommen.

Soweit die Verhandlungsführung nicht auf einen Ländervertreter übertragen ist, kann dieser in Arbeitsausschüssen und -gruppen mit Zustimmung des Delegationsleiters Erklärungen abgeben.

#### *V. Verfahren vor den Europäischen Gerichten*

1. Im Hinblick auf die hier zu wahren Verfahrensfristen unterrichtet die Bundesregierung den Bundesrat unverzüglich von allen Dokumenten und Informationen über Verfahren vor dem Europäischen Gerichtshof und dem Gericht erster Instanz, an denen die Bundesregierung beteiligt ist. Dies gilt auch für Urteile zu Verfahren, an denen sich die Bundesregierung beteiligt ist. Dies gilt auch für Urteile zu Verfahren, an denen sich die Bundesregierung beteiligt.
2. Macht die Bundesregierung bei Vorliegen der Voraussetzungen von § 7 Abs. 1 EUZBLG auf Beschluss des Bundesrates von den im Vertrag über die Europäische Union vorgesehenen Klagemöglichkeiten Gebrauch, so fertigt sie die entsprechende Klageschrift. Von den Ländern wird hierfür rechtzeitig eine ausführliche Stellungnahme zur Sache zur Verfügung gestellt.
3. Nr. 2 gilt entsprechend, wenn Bundesregierung in Verfahren vor dem Europäischen Gerichtshof Gelegenheit zur Stellungnahme hat.

#### *VI. Zusammenarbeit zwischen Ständiger Vertretung und Länderbüros*

Die Bundesregierung unterstützt über die Ständige Vertretung und gegebenenfalls die bilaterale Botschaft im Rahmen der gegebenen Möglichkeiten und soweit erforderlich die Länderbüros in Einzelfragen im Hinblick auf ihre Aufgaben. Einzelheiten sind in direktem Kontakt zwischen der Ständigen Vertretung und den Länderbüros zu klären.

#### *VII. Anwendung dieser Vereinbarung*

1. Die Regelungen dieser Vereinbarungen gelten für alle Vorhaben im Rahmen des Vertrages über die Europäische Union - einschliesslich sog. «Gemischter Beschlüsse» und der Vorbereitung und dem Abschluss von völkerrechtlichen Abkommen<sup>8</sup> - sowie für Vorhaben, die in dem «Abkommen

<sup>8</sup>In der Frage, ob und inwieweit darüber hinaus gegebenenfalls innerstaatlich eine Zustimmung der Länder nach der Lindauer Absprache erforderlich ist, bestehen bei Bund und Ländern unterschiedliche Rechtsauffassungen. Das Verfahren in diesen Fällen bleibt einer besonderen

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- zwischen 11 Mitgliedstaaten über die Sozialpolitik» ihre Grundlage haben.
2. Hinsichtlich der Regierungskonferenzen nach Art. N EU-V gilt:
    - Der Bundesrat wird über die Verhandlungen unterrichtet, soweit Länderinteressen betroffen sein könnten.<sup>9</sup>
    - Die Bundesregierung berücksichtigt die Stellungnahme des Bundesrates bei den Verhandlungen in entsprechender Anwendung von § 5 EUZBLG.
    - Die Länder können mit einem Beobachter - maximal mit zwei Beobachtern, falls ausschliessliche Länderkompetenzen betroffen sind - an Ressortgesprächen zur Vorbereitung der Regierungskonferenzen sowie - soweit möglich von Fall zu Fall - an den Regierungskonferenzen selbst teilnehmen.
  3. Hinsichtlich der Erweiterungsverhandlungen nach Art. O EU-V gilt:
    - Der Bundesrat wird über die Verhandlungen unterrichtet, soweit Länderinteressen betroffen sein könnten.
    - Die Bundesregierung berücksichtigt die Stellungnahme des Bundesrates bei den Verhandlungen in entsprechender Anwendung von § 5 EUZBLG.
    - Die Länder können mit einem Ländervertreter an Ressortabstimmungen der Verhandlungsposition sowie - soweit möglich - an der Ad-hoc-Gruppe "Erweiterung" des Rates teilnehmen, wenn der konkret zu behandelnde Fragenbereich die ausschliessliche Gesetzgebungskompetenz der Länder oder deren wesentliche Interessen berührt.
  4. Hinsichtlich der Assoziierungsverhandlungen nach Art. 238 EWG-V sowie für die Abkommen nach Art. 113 Abs. 3 EWG-V gelten die Regelungen des EUZBLG und dieser Vereinbarung mit der Ausnahme, dass sich die Teilnahme des Länderververtreters auf die Verhandlungen in der Ratsgruppe zur Aushandlung des Mandats für die Kommission beschränkt.

#### VIII. Schlussbestimmungen

1. Das Gesetz über die Zusammenarbeit von Bund und Ländern in Angelegenheiten der Europäischen Union und diese Vereinbarung ersetzen das Verfahren nach Art. 2 des Gesetzes vom 19. Dezember 1986 zur Einheitlichen Europäischen Akte und die dazu getroffene Vereinbarung zwischen Bundesregierung und der Regierungen der Länder.
2. Die Regierungen von Bund und Ländern werden durch geeignete institutionelle und organisatorische Vorkehrungen sicherstellen, dass die Handlungsfähigkeit der Bundesrepublik Deutschland und eine flexible Verhandlungsführung auf EG-Ebene gewährleistet bleiben.
3. Ergänzende Formen der fachlichen Zusammenarbeit und Fachkontakte zwischen Bund und Ländern - z.B. auch im Bildungs- und Kulturbereich - werden nach Massgabe von Art. 23 GG und des EUZBLG fortgeführt.
4. In Fällen des § 5 Abs. 2 EUZBLG ist die Zustimmung der Bundesregierung erforderlich, wenn Entscheidungen zu Ausgabenerhöhungen oder Einnahmемinderungen für den Bund führen können.
5. Der Beobachter der Länder hat die Aufgabe, die Länder bei der Wahrnehmung ihrer Rechte nach dem EUZBLG zu unterstützen. Seine Informations- und Beteiligungsmöglichkeiten gegenüber den Institutionen und Gremien der Europäischen Gemeinschaft sowie der Bundesregierung bleiben bestehen.<sup>10</sup>
6. Die Länder übermitteln der Bundesregierung ihre Vorschläge für die Besetzung des Ausschusses der Regionen rechtzeitig vor Ablauf der jeweiligen Mandatsperiode.
7. Die Vereinbarung gilt gem. § 11 EUZBLG nicht für den Bereich der Gemeinsamen Aussen- und Sicherheitspolitik der Europäischen Union.
8. Die Vereinbarung tritt mit dem Tage der Gründung der Europäischen Union in Kraft. Bund und Länder überprüfen diese Vereinbarung zum 01. Juli 1996 im Lichte der bis dahin gesammelten Erfahrungen, insbesondere im Hinblick auf die Anwendung der §§ 5 und 6 EUZBLG im Bereich der konkurrierenden und der Rahmengesetzgebung.

#### Protokollnotizen zu der Vereinbarung

1. Die Unterlagen der Europäischen Gemeinschaften werden im allgemeinen offen weitergegeben. Mitteilungen der EG-Organе über eine besondere Vertraulichkeit werden vom Bundesrat beachtet.  
Eine eventuell nach Abschnitt I Nr. 1 des Rundschreibens des Bundesministers des Innern vom 10. Oktober 1985 vorzunehmende VS-Einstufung wird vor Versendung an den Bundesrat vom

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Abprache überlassen.

<sup>9</sup>Das gilt auch für den Fall, dass die Verhandlungen von Persönlichen Beauftragten geführt werden sollten.

<sup>10</sup>Der Bund ist bereit, die Möglichkeit der Abordnung von Beamten aus dem Länderbereich in die Ständige Vertretung einzuräumen. Einzelheiten werden zwischen Bund - vertreten durch AA - und Ländern einvernehmlich festgelegt. Im Zuge einer solchen Regelung werden Bund und Länder den Inhalt der derzeitigen Ziffer 5 überprüfen.



- Bundesministerium für Wirtschaft - oder den sonst zuleitenden Ministerien vorgenommen.
2. Das jeweils federführende Ressort in der Bundesregierung trägt dafür Sorge, dass bei Vorhaben, die ausschliessliche Gesetzgebungsmaterien der Länder betreffen oder deren wesentliche Interessen berühren, dem Bundesrat auch dem Ressort vorliegende vorbereitende Papiere der Kommission zur Verfügung gestellt werden, die für die Meinungsbildung der Länder von Bedeutung sein können. Dies gilt auch für inoffizielle Dokumente (sog. «non-papers»)."

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## Appendix II: Legal Materials - Italy

### **I. Legge 9 marzo 1989, n.86: Norme generali sulla partecipazione dell'Italia al processo normativo comunitario e sulle procedure di esecuzione degli obblighi comunitari (GU 10 marzo 1989, n.58)**

#### **1. (Finalità)**

[1] Con i procedimenti e le misure previste dalla presente legge, lo Stato garantisce l'adempimento degli obblighi derivanti all'appartenenza dell'Italia alle Comunità europee che consistono:

a) all'emanazione dei regolamenti, direttive, decisioni e raccomandazioni (CECA) che, in conformità alle norme dei trattati istitutivi della Comunità europea del carbone e dell'acciaio, della comunità economica europea e della comunità europea dell'energia atomica, vincolano la Repubblica italiana ad adottare provvedimenti di attuazione;

b) all'accertamento giurisdizionale, con sentenza della Corte di giustizia delle Comunità europee, della incompatibilità di norme legislative e regolamenti con le disposizioni dei suddetti trattati.

[2] Con le modalità stabilite dalla presente legge, il Governo assicura l'informazione del Parlamento sullo svolgimento dei processi normativi comunitari.

#### **2. (Legge comunitaria)**

[1] Entro il 31 gennaio di ogni anno il Ministro per il coordinamento delle politiche comunitarie, sulla base degli atti emanati dalle istituzioni delle Comunità europee, verifica, con la collaborazione delle amministrazioni interessate, lo stato di conformità dell'ordinamento interno all'ordinamento comunitario e sottopone al Consiglio dei Ministri, di concerto con il Ministro degli affari esteri e gli altri Ministri interessati, un disegno di legge recante: "Disposizioni per l'adempimento di obblighi derivanti all'appartenenza dell'Italia alle comunità europee" (legge comunitaria per l'anno in riferimento).

[2] Il disegno di legge è presentato alle Camere entro il 1 marzo successivo.

[3] Nella relazione introduttiva del disegno di legge si dà conto, in particolare, della giurisprudenza della Corte di giustizia delle Comunità europee per quanto riguarda le sentenze aventi riflessi, sotto il profilo giuridico-istituzionale, sull'ordinamento interno e per quelle relative alle eventuali inadempienze e violazioni degli obblighi comunitari da parte della Repubblica italiana.

[4] All'articolo 10 della legge 16 aprile 1987, n.183 [1987, 609], il comma 2 è sostituito dal seguente:

"[2] Il Governo, entro il termine di novanta giorni, riferisce per iscritto alle Camere sullo stato di conformità o meno delle norme vigenti nell'ordinamento interno alle prescrizioni della raccomandazione o direttiva comunitaria."

#### **3. (Contenuti della legge comunitaria)**

[1] Il periodico adeguamento dell'ordinamento nazionale all'ordinamento comunitario è assicurato, di norma, dalla legge comunitaria annuale, mediante:

a) disposizioni modificative o abrogative di norme vigenti in contrasto con gli obblighi indicati all'articolo 1, comma 1;

b) disposizioni occorrenti per dare attuazione, o assicurare l'applicazione, agli atti del Consiglio o della Commissione delle Comunità europee di cui alla lettera a) del comma 1 dell'articolo 1, anche mediante conferimento al Governo di delega legislativa;

c) autorizzazione al Governo ad attuare in via regolamentare le direttive o le raccomandazioni (CECA) a norma dell'articolo 4.

#### **9. (Competenze delle regioni e delle provincie autonome)**

[1] Le regioni a statuto speciale e le provincie autonome di Trento e di Bolzano, nelle materie di competenza esclusiva, possono dare immediata attuazione alle direttive comunitarie.





[2] Le regioni a statuto speciale e le provincie autonome di Trento e di Bolzano, nelle materie di competenza concorrente, possono dare attuazione alle direttive dopo l'entrata in vigore della prima legge comunitaria successiva alla notifica della direttiva.

[3] La legge comunitaria o altra legge dello Stato che dia attuazione alle direttive in materia di competenza regionale indica quali disposizioni di principio non sono derogabili dalla legge regionale sopravvenuta e prevalgono sulle contrarie disposizioni eventualmente già emanate dagli organi regionali. Nelle materie di competenza esclusiva, le regioni a statuto speciale e le provincie autonome si adeguano alla legge dello Stato nei limiti della Costituzione e dei rispettivi statuti.

[4] In mancanza degli atti normativi della Regione, previsti nei commi 1, 2 e 3, si applicano tutte le disposizioni dettate per l'adempimento degli obblighi comunitari dalla legge dello Stato ovvero dal regolamento di cui all'articolo 4.

[5] La funzione di indirizzo e coordinamento delle attività amministrative delle regioni, nelle materie di cui hanno riguardo le direttive, attiene ad esigenze di carattere unitario, anche in riferimento agli obiettivi della programmazione economica ed agli impegni derivanti agli obblighi internazionali.

[6] Fuori dei casi di cui si esercita con legge o con atto avente forza di legge nei modi indicati dal comma 3 o, sulla base della legge comunitaria, con il regolamento preveduto dall'articolo 4, la funzione di indirizzo e coordinamento di cui al comma 5 è esercitata mediante deliberazione del Consiglio dei Ministri, su proposta del Presidente del Consiglio dei Ministri, o del Ministro per il coordinamento delle politiche comunitarie, d'intesa con i Ministri competenti.

#### 11. (Inadempimenti delle regioni e delle provincie autonome)

[1] Se l'inadempimento di uno degli obblighi previsti dall'articolo 1, comma 1, dipende da inattività amministrativa di una regione o di una provincia autonoma, il Ministro per il coordinamento delle politiche comunitarie, d'intesa con il Ministro per gli affari regionali ed i Ministri competenti, avvia la procedura prevista dall'articolo 6, terzo comma, del decreto del Presidente della Repubblica 24 luglio 1977, n.616.

[2] Il Consiglio dei Ministri, con la deliberazione prevista dall'articolo 6, terzo comma, del decreto del Presidente della Repubblica 24 luglio 1977, n.616, successivamente alla scadenza del termine assegnato alla regione o alla provincia autonoma interessata per provvedere, dispone, con le modalità di cui all'articolo 6, comma 3, della presente legge, l'intervento sostitutivo dello Stato; a tal fine può conferire, con le opportune direttive, i poteri necessari ad una commissione da nominarsi con decreto del Presidente del Consiglio dei Ministri, su proposta del Ministro per gli affari regionali, sentito il Ministro per il coordinamento delle politiche comunitarie.

[3] La commissione di cui al comma 2 è composta:

- a) del commissario del Governo, che la presiede
- b) da un magistrato amministrativo o da un avvocato dello Stato o da un professore universitario di ruolo di materie giuridiche
- c) da un terzo membro designato dalla regione o dalla provincia autonoma interessata o, in mancanza di tale designazione entro il termine di trenta giorni dalla richiesta, dal presidente del tribunale avente sede nel capoluogo della regione o della provincia, il quale con riferimento alle categorie di cui alla lettera b)

[4] Le funzioni di segreteria della commissione sono svolte dal personale del commissariato del Governo.

#### 12. (Inadempimenti degli enti pubblici)

[1] Se l'inadempimento di uno degli obblighi previsti dall'articolo 1, comma 1, dipende da inattività di un ente pubblico diverso dallo Stato, da una regione o una provincia autonoma, il Presidente del Consiglio dei Ministri, su proposta del Ministro per il coordinamento delle politiche comunitarie, di concerto con i Ministri competenti per materie ed acquiste le osservazioni dall'ente interessato, emana le direttive necessarie, assegnando all'ente medesimo un termine per provvedere.

[2] Perdurando l'inattività oltre il termine predetto, il Presidente del Consiglio dei Ministri conferisce ad un commissario i poteri da provvedere in sostituzione degli organi dell'ente.



**II. Decreto del Presidente della Repubblica 24 luglio 1977, n.616:  
Attuazione della delega di cui all'art.1 della legge 22 luglio 1975, n.382  
(GU 29 agosto 1977, n.234)**

**4. (Competenze dello Stato)**

[1] Lo Stato, nelle materie definite dal presente decreto, esercita soltanto le funzioni amministrative indicate negli articoli seguenti, nonché la funzione di indirizzo e di coordinamento nei limiti, nelle forme e con le modalità previste dall'art. 3 della legge 22 luglio 1975, n.382, e le funzioni, anche nelle materie trasferite o delegate, attinenti ai rapporti internazionali e con la Comunità economica europea, alla difesa nazionale, alla pubblica sicurezza.

[2] Le regioni non possono svolgere all'estero attività promozionali relative alle materie di loro competenza se non con previa intesa con il Governo e nell'ambito degli indirizzi e degli atti di coordinamento di cui al comma precedente.

[3] Il Governo della Repubblica, tramite il commissario del Governo, impartisce direttive per l'esercizio delle funzioni amministrative delegate alle regioni, che sono tenute ad osservarle, ed esercita il potere di sostituzione previsto dall'art. 2 della legge n.382 del 22 luglio 1975.

**6. (Regolamenti e direttive della Comunità economica europea)**

[1] Sono trasferite alle regioni in ciascuna delle materie definite dal presente decreto anche le funzioni amministrative relative all'applicazione dei regolamenti della Comunità economica europea nonché all'attuazione delle sue direttive fatte proprio dallo Stato con legge che indica espressamente le norme di principio.

[2] In mancanza della legge regionale, sarà osservata quella dello Stato in tutte le sue disposizioni.

[3] Il Governo della Repubblica, in caso di accertata inattività degli organi regionali che comporti inadempimento degli obblighi comunitari, può prescrivere con deliberazione del Consiglio dei Ministri, su parere della Commissione parlamentare per le questioni regionali e sentita la regione interessata, un congruo termine per provvedere. Qualora la inattività degli organi regionali perduri dopo la scadenza di tale termine, il Consiglio dei Ministri può adottare i provvedimenti necessari in sostituzione della amministrazione regionale.



## Appendix III: Legal Materials - Austria

### I. Bundes-Verfassungsgesetz [B-VG]

state according to the amendment 1994 [Bundes-Verfassungsgesetz-Novelle 1994 - B-VGN 1994 - BGBl 1994/1013; NR: GP XIX RV 27 AB 58 S 11], 21.12.1994

#### "Erstes Hauptstück

#### Allgemeine Bestimmungen. Europäische Union

[...]

**Art 16** [1] Die Länder können in Angelegenheiten, die in ihren selbständigen Wirkungsbereich fallen, staatsverträge mit an Österreich angrenzenden Staaten oder deren Teilstaaten abschließen.

[2] Der Landeshauptmann hat die Bundesregierung vor der Aufnahme von Verhandlungen über einen solchen Staatsvertrag zu unterrichten. Vor dessen Abschluß ist vom Landeshauptmann die Zustimmung der Bundesregierung einzuholen. Die Zustimmung gilt als erteilt, wenn die Bundesregierung nicht binnen acht Wochen von dem Tage, an dem das Ersuchen um Zustimmung beim Bundeskanzleramt eingelangt ist, dem Landeshauptmann mitgeteilt hat, daß die Zustimmung verweigert wird. Die Bevollmächtigung zur Aufnahme von Verhandlungen und der Abschluß des Staatsvertrages obliegen dem Bundespräsidenten auf Vorschlag der Landesregierung und mit Gegenzeichnung des Landeshauptmannes.

[3] Auf Verlangen der Bundesregierung sind Staatsverträge nach Abs. 1 vom Land zu kündigen. *Kommt ein Land dieser Verpflichtung nicht rechtzeitig nach, so geht die Zuständigkeit dazu auf den Bund über.*

[4] Die Länder sind verpflichtet, Maßnahmen zu treffen, die in ihrem selbständigen Wirkungsbereich zur Durchführung von Staatsverträgen erforderlich werden; *kommt ein Land dieser Verpflichtung nicht rechtzeitig nach, so geht die Zuständigkeit zu solchen Maßnahmen, insbesondere zur Erlassung der notwendigen Gesetze, auf den Bund über. Eine gemäß dieser Bestimmung vom Bund getroffene Maßnahme, insbesondere ein solcherart erlassenes Gesetz oder eine solcherart erlassene Verordnung tritt außer Kraft, sobald das Land die erforderlichen Maßnahmen getroffen hat.*

[5] Ebenso hat der Bund bei Durchführung völkerrechtlicher Verträge das Überwachungsrecht auch in solchen Angelegenheiten, die zum selbständigen Wirkungsbereich der Länder gehören. Dem Bund kommen bei Durchführung völkerrechtlicher Verträge auch in solchen Angelegenheiten, die zum selbständigen Wirkungsbereich der Länder gehören, die in Art. 102 und 103 festgesetzten Befugnisse zu.

[...]

### B. Europäische Union

#### Art 23a

[1] Die von der Republik Österreich zu entsendenden Abgeordneten zum Europäischen Parlament werden auf Grund des gleichen, unmittelbaren, geheimen und persönlichen Wahlrechtes der Männer und Frauen, die vor dem 1. Jänner des Jahres der Wahl das 18. Lebensjahr vollendet haben und am Stichtag der Wahl entweder die österreichische Staatsbürgerschaft besitzen und nicht nach Maßgabe des Rechtes der Europäischen Union vom Wahlrecht ausgeschlossen sind oder die Staatsangehörigkeit eines anderen Mitgliedstaates der Europäischen Union besitzen und nach Maßgabe des Rechtes der Europäischen Union wahlberechtigt sind, nach den Grundsätzen der Verhältniswahl gewählt. Durch Bundesgesetz werden die näheren Bestimmungen über das Wahlverfahren getroffen.

[2] Das Bundesgebiet bildet für die Wahlen zum Europäischen Parlament einen einheitlichen Wahlkörper.

[3] Wählbar sind alle Männer und Frauen, die vor dem 1. Jänner des Jahres der Wahl das 19. Lebensjahr vollendet haben und am Stichtag der Wahl entweder die österreichische Staatsbürgerschaft besitzen und nicht nach Maßgabe des Rechtes der Europäischen Union vom Wahlrecht ausgeschlossen sind oder die Staatsangehörigkeit eines anderen Mitgliedstaates der Europäischen Union besitzen und nach Maßgabe des Rechtes der Europäischen Union wahlberechtigt sind.

[4] Die Ausschließung vom Wahlrecht und von der Wählbarkeit kann nur die Folge einer gerichtlichen Verurteilung sein.

[5] Die Durchführung und Leitung der Wahlen zum Europäischen Parlament obliegt den für die Wahlen zum Nationalrat bestellten Wahlbehörden. Die Stimmabgabe im Ausland muß nicht vor einer



Wahlbehörde erfolgen. Die näheren Bestimmungen über die Stimmabgabe im Ausland können vom Nationalrat nur in Anwesenheit von mindestens der Hälfte der Mitglieder und mit einer Mehrheit von zwei Dritteln der abgegebenen Stimmen beschlossen werden.

[6] Die Wählerverzeichnisse werden von den Gemeinden im übertragenen Wirkungsbereich angelegt.

#### Art 23b

[1] Öffentlich Bediensteten ist, wenn sie sich um ein Mandat im Europäischen Parlament bewerben, die für die Bewerbung um das Mandat erforderliche freie Zeit zu gewähren. Öffentlich Bedienstete, die zu Mitgliedern des Europäischen Parlaments gewählt wurden, sind für die Dauer der Mandatsausübung unter Entfall der Dienstbezüge außer Dienst zu stellen. Das Nähere wird durch Gesetz geregelt.

[2] Hochschullehrer können eine Tätigkeit in Forschung und Lehre und die Prüfungstätigkeit auch während der Zugehörigkeit zum Europäischen Parlament fortsetzen. Die Dienstbezüge für diese Tätigkeit sind entsprechend den tatsächlich erbrachten Leistungen zu bemessen, dürfen aber 25% der Bezüge eines Hochschullehrers nicht übersteigen.

[3] Insoweit dieses Bundesverfassungsgesetz die Unvereinbarkeit von Funktionen mit der Zugehörigkeit oder mit der ehemaligen Zugehörigkeit zum Nationalrat vorsieht, sind diese Funktionen auch mit der Zugehörigkeit oder mit der ehemaligen Zugehörigkeit zum Europäischen Parlament unvereinbar.

#### Art 23c

[1] Die österreichische Mitwirkung an der Ernennung von Mitgliedern der Kommission, des Gerichtshofes, des Gerichtes erster Instanz, des Rechnungshofes, des Verwaltungsrates der Europäischen Investitionsbank, des Wirtschafts- und Sozialausschusses sowie des Ausschusses der Regionen im Rahmen der Europäischen Union obliegt der Bundesregierung.

[2] Für die Mitglieder der Kommission, des Gerichtshofes, des Gerichtes erster Instanz, des Rechnungshofes und des Verwaltungsrates der Europäischen Investitionsbank hat die Bundesregierung dabei das Einvernehmen mit dem Hauptausschuß des Nationalrates herzustellen. Die Bundesregierung hat den Hauptausschuß des Nationalrates und den Bundespräsidenten gleichzeitig von der von ihr beabsichtigten Entscheidung zu unterrichten.

[3] Für die Mitglieder des Wirtschafts- und Sozialausschusses sind von der Bundesregierung Vorschläge der gesetzlichen und sonstigen beruflichen Vertretungen der verschiedenen Gruppen des wirtschaftlichen und sozialen Lebens einzuholen.

[4] Die österreichische Mitwirkung an der Ernennung von Mitgliedern des Ausschusses der Regionen und deren Stellvertretern hat auf Grund von Vorschlägen der Länder und des Österreichischen Städtebundes und des Österreichischen Gemeindebundes zu erfolgen. Hierbei haben die Länder je einen, der Österreichische Städtebund und der Österreichische Gemeindebund gemeinsam drei Vertreter vorzuschlagen.

[5] Von den gemäß Abs.3 und 4 namhaft gemachten Mitgliedern hat die Bundesregierung den Nationalrat zu unterrichten. Von den gemäß Abs. 2, 3 und 4 namhaft gemachten Mitgliedern hat die Bundesregierung den Bundesrat zu unterrichten.

#### Art 23d

[1] Der Bund hat die Länder unverzüglich über alle Vorhaben im Rahmen der europäischen Integration, die den selbständigen Wirkungsbereich der Länder berühren oder sonst für sie von Interesse sein könnten, zu unterrichten und ihnen Gelegenheit zur Stellungnahme zu geben. Solche Stellungnahmen sind an das Bundeskanzleramt zu richten. Gleiches gilt für die Gemeinden, soweit der eigene Wirkungsbereich oder sonstige wichtige Interessen der Gemeinden berührt werden. Die Vertretung der Gemeinden obliegt in diesen Angelegenheiten dem Österreichischen Städtebund und dem Österreichischen Gemeindebund (Art 115 Abs 3).

[2] Liegt dem Bund fristgerecht eine einheitliche Stellungnahme der Länder zu einem Vorhaben im Rahmen der europäischen Union vor, das Angelegenheiten betrifft, in denen die Gesetzgebung Landessache ist, so ist der Bund bei Verhandlungen und Abstimmungen in der Europäischen Union an diese Stellungnahme gebunden. Er darf davon nur aus zwingenden außen- und integrationspolitischen Gründen abweichen. Der Bund hat diese Gründe den Ländern unverzüglich mitzuteilen.

[3] Soweit ein Vorhaben im Rahmen der Europäischen Union auch Angelegenheiten betrifft, in denen die Gesetzgebung Landessache ist, kann die Bundesregierung einem von den Ländern namhaft gemachten Vertreter die Mitwirkung an der Willensbildung im Rat übertragen. Die Wahrnehmung dieser





Befugnis erfolgt unter Beteiligung des zuständigen Mitgliedes der Bundesregierung und in Abstimmung mit diesem. Für einen solchen Ländervertreter gilt Abs.2. Der Vertreter der Länder ist dabei in Angelegenheiten der Bundesgesetzgebung dem Nationalrat, in Angelegenheiten der Landesgesetzgebung den Landtagen gemäß Art.142 verantwortlich.

[4] Die näheren Bestimmungen zu den Abs. 1 bis 3 sind in einer Vereinbarung zwischen dem Bund und den Ländern (Artikel 15a Abs 1) festzulegen.

[5] Die Länder sind verpflichtet, Maßnahmen zu treffen, die in ihrem selbständigen Wirkungsbereich zur Durchführung von Rechtsakten im Rahmen der europäischen Integration erforderlich werden; *kommt ein Land dieser Verpflichtung nicht rechtzeitig nach und wird dies von einem Gericht im Rahmen der Europäischen Union gegenüber Österreich festgestellt, so geht die Zuständigkeit zu solchen Maßnahmen, insbesondere zur Erlassung der notwendigen Gesetze, auf den Bund über. Eine gemäß dieser Bestimmung vom Bund getroffene Maßnahme, insbesondere ein solcherart erlassenes Gesetz oder eine solcherart erlassene Verordnung, tritt außer Kraft, sobald das Land die erforderlichen Maßnahmen getroffen hat.*

#### Art 23e

[1] Das zuständige Mitglied der Bundesregierung hat den Nationalrat und den Bundesrat unverzüglich über alle Vorhaben im Rahmen der Europäischen Union zu unterrichten und ihnen Gelegenheit zur Stellungnahme zu geben.

[2] Liegt dem zuständigen Mitglied der Bundesregierung eine Stellungnahme des Nationalrates zu einem Vorhaben im Rahmen der Europäischen Union vor, das durch Bundesgesetz umzusetzen ist oder das auf die Erlassung eines unmittelbar anwendbaren Rechtsaktes gerichtet ist, der Angelegenheiten betrifft, die bundesgesetzlich zu regeln wären, so ist es bei Verhandlungen und Abstimmungen in der Europäischen Union an diese Stellungnahme gebunden. Es darf davon nur aus zwingenden außen- und intergationspolitischen Gründen abweichen.

[3] Wenn das zuständige Mitglied der Bundesregierung von einer Stellungnahme des Nationalrates gemäß Abs.2 abweichen will, so hat es den Nationalrat neuerlich zu befragen. Soweit der in Vorbereitung befindliche Rechtsakt der Europäischen Union eine Änderung des geltenden Bundesverfassungsrechtes bedeuten würde, ist eine Abweichung jedenfalls nur zulässig, wenn ihr der Nationalrat innerhalb angemessener Frist nicht widerspricht.

[4] Wenn der Nationalrat eine Stellungnahme gemäß Abs.2 abgegeben hat, so hat das zuständige Mitglied der Bundesregierung dem Nationalrat nach der Abstimmung in der Europäischen Union Bericht zu erstatten. Insbesondere hat das zuständige Mitglied der Bundesregierung, wenn es von einer Stellungnahme des Nationalrates abgewichen ist, die Gründe hierfür dem Nationalrat unverzüglich mitzuteilen.

[5] Die Wahrnehmung der Zuständigkeiten des Nationalrates gemäß den Abs.1 bis 4 obliegt grundsätzlich dessen Hauptausschuß. Die näheren Bestimmungen hiezu werden durch das Bundesgesetz über die Geschäftsordnung des Nationalrates getroffen. Dabei kann insbesondere geregelt werden, inwieweit für die Behandlung im Rahmen der Europäischen Union anstelle des Hauptausschusses ein eigener Unterausschuß des Hauptausschusses zuständig ist und die Wahrnehmung der Zuständigkeiten gemäß den Abs.1 bis 4 dem Nationalrat selbst vorbehalten ist. Für den ständigen Unterausschuß gilt Art.55 Abs.2.

[6] Liegt dem zuständigen Mitglied der Bundesregierung eine Stellungnahme des Bundesrates zu einem Vorhaben im Rahmen der Europäischen Union vor, das zwingend durch ein Bundesverfassungsgesetz umzusetzen ist, das nach Art.44 Abs.2 der Zustimmung des Bundesrates bedürfte, so ist es bei Verhandlungen und Abstimmungen im Rahmen der Europäischen Union an diese Stellungnahme gebunden. Es darf davon nur aus zwingenden außen- und integrationspolitischen Gründen abweichen. Die Wahrnehmung der Zuständigkeiten des Bundesrates gemäß Abs.1 und diesem Absatz wird durch die Geschäftsordnung des Bundesrates näher geregelt.



**Art 23f**

[1] Österreich wirkt an der Gemeinsamen Außen- und Sicherheitspolitik der Europäischen Union auf Grund des Titels V des Vertrages über die Europäische Union mit. Dies schließt die Mitwirkung an Maßnahmen ein, mit denen die Wirtschaftsbeziehungen zu einem oder mehreren dritten Ländern ausgesetzt, eingeschränkt oder vollständig eingestellt werden.

[2] Für Beschlüsse im Rahmen der Gemeinsamen Außen- und Sicherheitspolitik der Europäischen Union auf Grund des Titels V des Vertrages über die Europäische Union sowie für Beschlüsse im Rahmen der Zusammenarbeit in den Bereichen Justiz und Inneres auf Grund des Titels VI des Vertrages über die Europäische Union gilt Art. 23e Abs. 2 bis 5.

(...)

## **Sechstes Hauptstück**

### **Garantien der Verfassung und der Verwaltung.**

(...)

## **C. Verfassungsgerichtshof**

(...)

**Art 142**

[1] Der Verfassungsgerichtshof erkennt über die Anklage, mit der die verfassungsmäßige Verantwortlichkeit der obersten Bundes- und Landesorgane für die durch ihre Amtstätigkeit erfolgten schuldhaften Rechtsverletzungen geltend gemacht wird.

[2] Die Anklage kann erhoben werden:

a) gegen den Bundespräsidenten wegen Verletzung der Bundesverfassung: durch Beschluß der Bundesversammlung;

b) gegen die Mitglieder der Bundesregierung und die ihnen hinsichtlich der Verantwortlichkeit gleichgestellten Organe wegen Gesetzesverletzung: durch Beschluß des Nationalrates;

c) gegen einen österreichischen Vertreter im Rat wegen Gesetzesverletzung in Angelegenheiten, in denen die Gesetzgebung Bundessache wäre: durch Beschluß des Nationalrates, wegen Gesetzesverletzung in Angelegenheiten, in denen die Gesetzgebung Landessache wäre: durch gleichlautende Beschlüsse aller Landtage;

d) gegen die Mitglieder einer Landesregierung und die ihnen hinsichtlich der Verantwortlichkeit durch dieses Gesetz oder durch Landesverfassung gleichgestellten Organe wegen Gesetzesverletzung: durch Beschluß des zuständigen Landtages;

e) gegen einen Landeshauptmann, dessen Stellvertreter (Artikel 105 Absatz 1) oder ein Mitglied der Landesregierung (Artikel 103 Absatz 2 und 3) wegen Gesetzesverletzung sowie wegen Nichtbefolgung der Verordnungen oder sonstigen Anordnungen (Weisungen) des Bundes in Angelegenheiten der mittelbaren Bundesverwaltung, wenn es sich um ein Mitglied der Landesregierung handelt, auch der Weisungen des Landeshauptmannes in diesen Angelegenheiten: durch Beschluß der Bundesregierung;

f) gegen Organe der Bundeshauptstadt Wien, soweit sie Aufgaben aus dem Bereich der Bundesvollziehung im eigenen Wirkungsbereich besorgen, wegen Gesetzesverletzung: durch Beschluß der Bundesregierung;

g) gegen einen Landeshauptmann wegen Nichtbefolgung einer Weisung gemäß Artikel 14 Abs. 8: durch Beschluß der Bundesregierung

h) gegen einen Präsidenten oder Amtsführenden Präsidenten des Landesschulrates wegen Gesetzesverletzung sowie wegen Nichtbefolgung der Verordnungen oder sonstigen Abordnungen (Weisungen) des Bundes: durch Beschluß der Bundesregierung.

[3] Wird von der Bundesregierung gemäß Absatz 2 lit e die Anklage nur gegen einen Landeshauptmann oder dessen Stellvertreter erhoben, und erweist es sich, daß einem nach Artikel 103 Absatz 2 mit Angelegenheiten der mittelbaren Bundesverwaltung befaßten anderen Mitglied der Landesregierung ein Verschulden im Sinne des Absatzes 2 lit e zur Last fällt, so kann die Bundesregierung jederzeit bis zur Fällung des Erkenntnisses ihre Anklage auch auf dieses Mitglied der Landesregierung ausdehnen.



### APPENDIX III

[4] Das verurteilende Erkenntnis des Verfassungsgerichtshofes hat auf Verlust des Amtes, unter besonders erschwerenden Umständen auch auf zeitweiligen Verlust der politischen Rechte, zu lauten; bei geringfügigen Rechtsverletzungen in den in Absatz 2 unter c, e, g und h erwähnten Fällen kann sich der Verfassungsgerichtshof auf die Feststellung beschränken, daß eine Rechtsverletzung vorliegt. Der Verlust des Amtes des Präsidenten des Landesschulrates hat auch den Verlust des Amtes zur Folge, mit dem das Amt des Präsidenten gemäß Artikel 81 a Abs. 3 lit b verbunden ist.

[5] Der Bundespräsident kann von dem ihm nach Art. 65 Abs. 2 lit c zustehenden Recht nur auf Antrag des Vertretungskörpers oder der Vertretungskörper, von dem oder von denen die Anklage beschlossen worden ist, wenn aber die Bundesregierung die Anklage beschlossen hat, nur auf deren Antrag Gebrauch machen, und zwar in allen Fällen nur mit Zustimmung des Angeklagten."



## II. Vereinbarung zwischen Bund und Ländern gemäß Art 15a B-VG über die Mitwirkung der Länder und Gemeinden in Angelegenheiten der Europäischen Integration [BGBl 1992/775]

Der Bund, vertreten durch die Bundesregierung,  
und die Länder

Burgenland, Kärnten, Niederösterreich, Oberösterreich, Salzburg, Steiermark, Tirol, Vorarlberg und Wien,  
jeweils vertreten durch den Landeshauptmann - im folgenden Vertragsparteien genannt -, sind  
übereingekommen, gemäß Art 15a B-VG die nachstehende Vereinbarung zu schließen:

### Art 1 (Informationspflicht des Bundes)

[1] Der Bund unterrichtet die Länder unverzüglich im Wege der Verbindungsstelle der Bundesländer über alle Vorhaben im Rahmen der Europäischen Integration, die den selbständigen Wirkungsbereich der Länder berühren oder sonst für sie von Interesse sein könnten. Gleiches gilt für die Gemeinden, soweit der eigene Wirkungsbereich oder sonstige wichtige Interessen der Gemeinden berührt werden. Die Vertretung der Gemeinden obliegt in diesen Angelegenheiten dem österreichischen Städtebund und dem österreichischen Gemeindebund.

[2] Die Unterrichtung erfolgt insbesondere durch Übersendung der dem Bund vorliegenden

- a) Dokumente, Berichte und Mitteilungen von Organen und Einrichtungen der Europäischen Gemeinschaften, der Europäischen Freihandelsassoziation und des Europäischen Wirtschaftsraumes,
- b) Dokumente, Berichte und Mitteilungen über informelle Ministertreffen und Gremien im Rahmen der Europäischen Gemeinschaften, der Europäischen Freihandelsassoziation und des Europäischen Wirtschaftsraumes,
- c) Dokumente und Informationen über Verfahren vor Europäischen Gerichten und Streitbeilegungseinrichtungen, an denen die Republik Österreich beteiligt ist, sowie
- d) Berichte der österreichischen Mission bei den Europäischen Gemeinschaften

[3] Über Vorhaben des Bundes in Angelegenheiten der Europäischen Integration werden die Länder und Gemeinden im Wege der Einrichtungen gemäß dem Bundesgesetz über die Errichtung eines Rates für Fragen der österreichischen Integrationspolitik, BGBl 389/1989, und gemäß der Verordnung des Bundeskanzlers über die Einsetzung und Geschäftsordnung der Arbeitsgruppe für Integrationsfragen, BGBl 574/1989, unterrichtet. Diese Unterrichtung erfolgt insbesondere durch Übermittlung von Dokumenten und Informationen über förmliche Initiativen, Stellungnahmen und Erläuterungen der Bundesregierung für Organe der Europäischen Gemeinschaften, der Europäischen Freihandelsassoziation und des Europäischen Wirtschaftsraumes.

### Art 2 (Verfahren)

[1] Die Übermittlung von Informationen im Sinne des Art 1 Abs 1 und 2 an die Verbindungsstelle der Bundesländer, an den österreichischen Städtebund und an den Gemeindebund erfolgt schriftlich.

[2] Das Bundeskanzleramt kann der Verbindungsstelle der Bundesländer, dem österreichischen Städtebund und dem österreichischen Gemeindebund Informationen, insbesondere in dringenden Fällen, ausnahmsweise auch mündlich übermitteln.

[3] Der Verbindungsstelle der Bundesländer obliegt die Verteilung und Weitergabe dieser Informationen an die Länder.

[4] Die Übermittlung der Informationen erfolgt zum frühestmöglichen Zeitpunkt. Das Bundeskanzleramt übermittelt die Unterlagen der Verbindungsstelle der Bundesländer in zwei Exemplaren, dem österreichischen Städtebund und dem österreichischen Gemeindebund in je einem Exemplar.

### Art 3 (Zugang zu einschlägigen Datenbanken)

[1] Soweit dem Bund Zugang zu Datenbanken im Rahmen der europäischen Integration gewährt wird, wird er sich bemühen, diese nach Maßgabe der rechtlichen und technischen Möglichkeiten und gegen Kostenersatz auch den Ländern, dem österreichischen Städtebund und dem österreichischen Gemeindebund auf deren Ersuchen zugänglich zu machen.

[2] Soweit dies zur Wahrnehmung integrationspolitischer Belange erforderlich und datenschutzrechtlich zulässig ist, gewährt jede Vertragspartei den übrigen Vertragsparteien auf deren Vergangen gegen Kostenersatz den Zugang zu ihren eigenen Datenbanken.





**Art 4 (Fristen)**

[1] Gleichzeitig mit der Übermittlung der Informationen gemäß Art 1 Abs 1 und 2 gibt das Bundeskanzleramt der Verbindungsstelle der Bundesländer, dem österreichischen Städtebund und dem österreichischen Gemeindebund nach Möglichkeit den vorgesehenen Zeitplan der Behandlung des jeweiligen Vorhabens durch die im Rahmen der europäischen Integration zuständigen Organe bekannt.

[2] Das Bundeskanzleramt teilt der Verbindungsstelle der Bundesländer, dem österreichischen Städtebund und dem österreichischen Gemeindebund mit, welche Frist den Ländern und Gemeinden für die Erstattung einer Stellungnahme im Hinblick auf den Verfahrensablauf vor den im Rahmen der europäischen Integration zuständigen Organen zur Verfügung steht. Bei der Festsetzung dieser Frist sind der Koordinationsbedarf der Länder und der Gemeinden und ein angemessener Zeitraum für die Auswertung der Stellungnahmen durch den Bund zu berücksichtigen.

**Art 5 (Allgemeine Stellungnahmen)**

[1] Der Bund hat fristgerechte Stellungnahmen der Länder und Gemeinden zu Vorhaben im Sinne des Art 1 Abs 1 bei der Festlegung des Standpunktes der Republik Österreich in den zuständigen Organen der europäischen Integration entsprechend zu erwägen.

[2] Stellungnahmen der Länder, des österreichischen Städtebundes und des österreichischen Gemeindebundes sind schriftlich an das Bundeskanzleramt zu richten.

**Art 6 (Bindende Stellungnahmen der Länder)**

[1] Liegt dem Bund fristgerecht eine einheitliche Stellungnahme der Länder zu einem Vorhaben im Rahmen der europäischen Integration vor, das Angelegenheiten betrifft, in denen die Gesetzgebung Landessache ist, so ist der Bund bei Verhandlungen und Abstimmungen an diese Stellungnahme gebunden. Er darf davon nur aus zwingenden außen- und integrationspolitischen Gründen abweichen.

[2] In welche Weise die Länder eine einheitliche Stellungnahme herbeiführen, ist ausschließlich Sache der Länder. Insbesondere kommt dafür eine Ländervereinbarung gemäß Art 15a B-VG in Betracht.

[3] Das Bundeskanzleramt teilt den Ländern im Wege der Verbindungsstelle der Bundesländer die Gründe für ein Abweichen von einer einheitlichen Stellungnahme der Länder gemäß Abs 1 unverzüglich, spätestens jedoch binnen acht Wochen nach der amtlichen Kundmachung des betreffenden Rechtsaktes, schriftlich mit.

**Art 7 (Nachträgliche Abänderung von Stellungnahmen)**

[1] Wenn Vorhaben im Rahmen der europäischen Integration, von denen die Länder oder Gemeinden gemäß Art 1 Abs 1 und 2 unterrichtet wurden, in weiterer Folge durch die im Rahmen der europäischen Integration zuständigen Organe geändert werden, dann unterrichtet das Bundeskanzleramt davon unverzüglich die Verbindungsstelle der Bundesländer, den österreichischen Gemeindebund und den österreichischen Städtebund.

[2] Wenn sich daraus Auswirkungen für die einheitliche Stellungnahme der Länder gemäß Art 6 Abs 1 ergeben, steht es den Ländern frei, ihre einheitliche Stellungnahme entsprechend anzupassen oder zu ergänzen. Die Organe des Bundes berücksichtigen eine geänderte oder ergänzte einheitliche Stellungnahme der Länder gemäß Art 6 Abs 1, wenn diese im Hinblick auf den Stand des Verfahrens vor den im Rahmen der europäischen Integration zuständigen Organen rechtzeitig eintrifft.

**Art 8 (Einbindung von Ländervertretern in die Verhandlungsdelegation)**

[1] Wenn Verhandlungen oder Beratungen der europäischen Integration Angelegenheiten betreffen, die den selbständigen Wirkungsbereich der Länder berühren oder sonst für sie von Interesse sein könnten, dann gibt der Bund dies den Ländern im Wege der Verbindungsstelle der Bundesländer bekannt. Das Bundeskanzleramt unterrichtet die Verbindungsstelle der Bundesländer über Zeitpunkt, Ort und Verhandlungs- oder Beratungsgegenstand, wenn die Länder darum ersuchen und dies integrationspolitisch tatsächlich möglich ist, dann werden der österreichischen Delegation Vertreter der Länder auf deren Kosten beigezogen.

[2] Die Vertragsparteien erarbeiten gemeinsam eine Liste jener Strukturen im Rahmen der europäischen Integration, an denen Ländervertreter gemäß Abs 1 teilnehmen können.

[3] Die Vertreter der Länder gemäß Abs 1 werden von den Landeshauptmännern im Wege der Verbindungsstelle der Bundesländer namhaft gemacht. Für Wortmeldungen solcher Vertreter im Rahmen der jeweiligen Delegation ist das Einvernehmen mit dem Delegationsleiter erforderlich.

**Art 9 (Ländervertreter bei der österreichischen Mission)**



Die Länder sind berechtigt, im Einvernehmen mit dem Bundesministerium für auswärtige Angelegenheiten auf ihre Kosten Vertreter und sonstiges Personal an die österreichische Mission bei den Europäischen Gemeinschaften zu entsenden.

**Art 10 (Klagserhebung)**

[1] Wenn im Falle einer EG- Mitgliedschaft Österreichs ein rechtswidriges Handeln oder Unterlassen von Organen der Europäischen Gemeinschaften eine Angelegenheit betrifft, in welcher die Gesetzgebung Landessache ist, dann ergreift der Bund auf Ansuchen eines Landes die nach dem Gemeinschaftsrecht hierfür in Betracht kommenden Rechtsbehelfe vor dem Gerichtshof der Europäischen Gemeinschaften, sofern kein anderes Land diesem Ansuchen widerspricht und nicht zwingende außen- und integrationspolitische Gründe dagegen sprechen.

[2] Ansuchen gemäß Abs 1 sind dem Bundeskanzleramt schriftlich zu übermitteln. Solche Ansuchen haben die in den Vorschriften des Gemeinschaftsrechts vorgesehenen wesentlichen Inhalte einer Klage vor dem Gerichtshof der Europäischen Gemeinschaften, insbesondere der Begründung, zu enthalten.

**Art 11 (Vertretung der Republik nach außen)**

Die Befugnisse der Vertretung des Bundespräsidenten zur Vertretung der Republik nach außen werden durch die vorliegende Vereinbarung nicht berührt.

**Art 12 (Kosten)**

[1] In den Fällen des Art 10 sind die jeweils betroffenen Länder dem Bund zur ungeteilten Hand zum Ersatz der zur zweckentsprechenden Rechtsverfolgung notwendigen Kosten verpflichtet, die dem Bund im Zusammenhang mit Verfahren vor dem Gerichtshof der Europäischen Gemeinschaften erwachsen.

[2] Darüber hinaus sind die jeweils betroffenen Länder zur Tragung jener Kosten verpflichtet, die der Republik Österreich im Zusammenhang mit Verfahren vor dem Gerichtshof der Europäischen Gemeinschaften wegen eines EG-rechtswidrigen Verhaltens der Länder erwachsen.

**Art 13 (Anpassung)**

Die Vertragsparteien erklären sich bereit, diese Vereinbarung nach Maßgabe künftiger Entwicklungen im Rahmen der Europäischen Integration auf einen allfälligen Anpassungsbedarf hin zu überprüfen.

**Art 14 (Inkrafttreten)**

[1] Diese Vereinbarung tritt einen Monat nach Ablauf des Tages in Kraft, an dem

1. die nach den Landesverfassungen erforderlichen Voraussetzungen für das Inkrafttreten erfüllt sind und beim Bundeskanzleramt die Mitteilungen der Länder darüber vorliegen, sowie
2. die nach der Bundesverfassung erforderlichen Voraussetzungen für das Inkrafttreten erfüllt sind.

[2] Das Bundeskanzleramt wird den Ländern die Erfüllung der Voraussetzungen nach Abs 1 sowie den Tag des Inkrafttretens der Vereinbarung mitteilen.

**Art 15 (Hinterlegung)**

Diese Vereinbarung wird in einer Urschrift ausgefertigt. Die Urschrift wird beim Bundeskanzleramt hinterlegt. Dieses hat allen Vertragsparteien beglaubigte Abschriften der Vereinbarung zu übermitteln.



### **III. Vereinbarung der Länder untereinander über die gemeinsame Willensbildung in Angelegenheiten der europäischen Integration vom 12.3.1992 (Wiener LGBl 1992/29)**

Die Länder Burgenland, Kärnten, Niederösterreich, Oberösterreich, Salzburg, Steiermark, Tirol, Vorarlberg und Wien schließen folgende Vereinbarung gemäß Art 15a B-VG über die gemeinsame Willensbildung der Länder in Angelegenheiten der europäischen Integration.

#### **Art 1 (Einrichtung und Aufgaben der Integrationskonferenz der Länder)**

1. Die Länder richten die "Integrationskonferenz der Länder" (IKL) ein.
2. Ihre Aufgabe ist, gemeinsame Länderinteressen in Angelegenheiten der europäischen Integration wahrzunehmen und wichtige integrationspolitische Fragen zu beraten.

#### **Art 2 (Mitglieder)**

In der Integrationskonferenz der Länder (IKL) sind alle Länder durch den Landeshauptmann und den Landtagspräsidenten vertreten. Das Präsidium des Bundesrates ist zur Teilnahme an den Sitzungen berechtigt.

#### **Art 3 (Beschlußfassung)**

1. Die Integrationskonferenz der Länder (IKL) trifft ihre Beschlüsse grundsätzlich in Sitzungen, in dringenden Fällen durch Umfrage.
2. Sie ist beschlußfähig, wenn die Einladung ordnungsgemäß versendet wurde und mindestens fünf Länder vertreten sind.
3. Jedes Land hat eine Stimme. Sie wird vom Landeshauptmann abgegeben.
4. Stimmenthaltungen sind zulässig. Wenn ein Land bei einer Sitzung nicht vertreten ist, gilt dies als Stimmenthaltung.
5. Ein Beschluß kommt zustande, wenn mindestens fünf Länder zustimmen und kein Land eine Gegenstimme erhebt.

#### **Art 4 (Einheitliche Stellungnahmen der Länder)**

Stellungnahmen der Integrationskonferenz der Länder (IKL) zu Vorhaben der europäischen Integration in Angelegenheiten, die in Gesetzgebung Landessache sind, gelten als einheitliche Stellungnahmen der Länder im Sinne des Art 10 Abs 5 B-VG, die den Bund bei zwischenstaatlichen Verhandlungen und Abstimmungen binden.

#### **Art 5 (Vorsitz)**

Der Vorsitz in der Integrationskonferenz der Länder (IKL) kommt jenem Landeshauptmann zu, der in der Landeshauptmännerkonferenz den Vorsitz führt.

#### **Art 6 (Geschäftsgang)**

1. Der Vorsitzende hat die Integrationskonferenz der Länder (IKL) nach Bedarf durch die Geschäftsstelle zu Sitzungen einzuladen. Die Einladung ist mindestens 10 Tage vor der Sitzung, ausgestattet mit Tagesordnung, durch die Geschäftsstelle zu versenden. In dringenden Fällen kann die Einladungsfrist mit Zustimmung aller Länder verkürzt werden.
2. Wenn von einem Land begründet eine Sitzung der Integrationskonferenz der Länder (IKL) verlangt wird, hat der Vorsitzende dies unverzüglich durch die Geschäftsstelle zu veranlassen.
3. Von jedem Land kann die Aufnahme eines Gegenstandes in die Tagesordnung verlangt werden. Wenn ein solcher Antrag nach Versendung der Einladung bei der Geschäftsstelle einlangt, kann er nur mit Zustimmung aller Länder behandelt werden.
4. Die Beurkundung und die Bekanntgabe der einheitlichen Stellungnahmen der Länder erfolgt für den Vorsitzenden der Integrationskonferenz der Länder (IKL) durch die Geschäftsstelle.
5. Die Geschäftsstelle der Integrationskonferenz der Länder (IKL) ist die Verbindungsstelle der Bundesländer.

#### **Art 7 (Ständiger Integrationsausschuß der Länder)**

Der Ständige Integrationsausschuß der Länder (SIL) hat in Angelegenheiten der europäischen Integration a) die Integrationskonferenz der Länder (IKL) zu beraten,



1. The first part of the document is a title page. It contains the title of the document, the author's name, and the date of the document. The title is "The First Part of the Document". The author's name is "John Doe". The date is "1/1/2020".

2. The second part of the document is an introduction. It contains a brief overview of the document and its purpose. The introduction states that the document is a report on the results of a study. The study was conducted by John Doe and Jane Smith. The purpose of the study was to determine the effects of a new treatment on a group of patients. The introduction also states that the document is organized into several sections. The first section is a description of the study. The second section is a description of the results. The third section is a discussion of the results. The fourth section is a conclusion. The introduction ends with a statement that the document is a preliminary report and that the results are subject to change.

3. The third part of the document is a description of the study. It contains a detailed description of the study design, the subjects, the treatments, and the outcomes. The study was a randomized controlled trial. It involved 100 subjects who were randomly assigned to two groups. The first group received the new treatment and the second group received the standard treatment. The outcomes were measured at baseline and at 12 weeks. The results showed that the new treatment was significantly more effective than the standard treatment. The description of the study ends with a statement that the results are preliminary and that further study is needed.

4. The fourth part of the document is a description of the results. It contains a detailed description of the results of the study. The results are presented in a table. The table shows the mean values for each outcome measure at baseline and at 12 weeks. The results show that the new treatment was significantly more effective than the standard treatment. The description of the results ends with a statement that the results are preliminary and that further study is needed.

5. The fifth part of the document is a discussion of the results. It contains a detailed discussion of the results of the study. The discussion states that the results are preliminary and that further study is needed. The discussion also states that the results are consistent with previous studies. The discussion ends with a statement that the results are preliminary and that further study is needed.

- b) Entscheidungen für die Integrationskonferenz der Länder (IKL.) vorzubereiten,
- c) im Rahmen der von der Integrationskonferenz der Länder (IKL.) erteilten Ermächtigung zu handeln.

**Art 8 (Inkrafttreten)**

Die Vereinbarung tritt einen Monat nach dem Tag in Kraft, an dem bei der Verbindungsstelle der Bundesländer als Depositär die schriftlichen Mitteilungen aller Vertragsparteien eingelangt sind, daß die nach den Landesverfassungen erforderlichen Voraussetzungen für das Inkrafttreten der Vereinbarung erfüllt sind.

**Art 9 (Ausfertigungen, Mitteilungen)**

1. Die Urschrift dieser Vereinbarung wird von der Verbindungsstelle der Bundesländer (Depositär) verwahrt. Der Depositär übermittelt jeder Vertragspartei eine von ihm beglaubigte Abschrift der Vereinbarung.

2. Der Depositär hat die Vereinbarung unverzüglich nach Vorliegen der Mitteilungen gemäß Art 8 der Bundesregierung zur Kenntnis zu bringen.

3. Alle die Vereinbarung betreffenden rechtserheblichen Mitteilungen sind an den Depositär zu richten. Sie gelten als im Zeitpunkt des Einlangens beim Depositär abgegeben. Der Depositär hat jede Vertragspartei von diesen Mitteilungen zu benachrichtigen.

**Art 10 (Kündigung)**

1. Diese Vereinbarung kann von jeder Vertragspartei gekündigt werden.

2. Die Kündigung wird zwei Monate nach ihrer schriftlichen Mitteilung an den Depositär wirksam.











